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## IMPEDING REENTRY: AGENCY AND JUDICIAL OBSTACLES TO LONGER HALFWAY HOUSE PLACEMENTS

S. David Mitchell\*

*Over 700,000 prisoners were released into their communities in 2008, at least 50,000 of those from federal custody. Once an obscure cause, nearly everyone agrees that prisoner reentry—the process by which former prisoners return to their communities—is of national importance. Absent adequate attention to transitional services, ex-offenders are often homeless, unemployed, and suffer from untreated substance abuse addictions.*

*Accordingly, President Obama and his two predecessors have devoted considerable attention to the issue. Congress passed the Second Chance Act in 2007. The Act increased the time that inmates may spend in halfway houses to improve their transition from incarceration to law-abiding citizenry and required individualized inmate assessments prior to placement. Nevertheless, the Bureau of Prisons is ignoring both mandates by categorically limiting the inmates' time in halfway houses. By presuming that six months is a satisfactory length of time to spend in a halfway house, the Bureau of Prisons fails to comply with its statutory authority and thus should not pass hard look review under Chevron v. NRDC.<sup>1</sup>*

*Federal inmates who have sought judicial review of the Bureau of Prisons' policy have been denied generally judicial access because of two doctrines: exhaustion and mootness. Courts are refusing to hear inmates' challenges either because the inmates have failed to exhaust their remedies under the Bureau's three-tiered administrative remedy process, or because the petition is moot. Inmates have invoked various exceptions to both doctrines and have had mixed success. Given official Bureau of Prisons statements, legal action is inevitable. Because legal action is a certainty, the time lost awaiting an administrative decision diminishes the amount of time that an inmate would be able to spend in a halfway house. The Bureau of Prisons should amend its policy, as the six-month placement absent an extraordinary justification fails to give proper effect to Congress' intent with regard to reentry.*

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\* Associate Professor, University of Missouri, School of Law, J.D. University of Pennsylvania. I would like to thank the University of Missouri Law School Foundation whose research support provided me the opportunity to write on this issue. I would also like to thank my colleagues Chris Wells, Phil Harter, and Michelle Cecil whose feedback was invaluable. I would also like to thank my wife, Enid, and my son, Langston, for allowing me the space to work on this Article during our family time together last summer.

1. Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837 (1984).

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*"It's déjà-vu, all over again."*

—Yogi Berra<sup>2</sup>

## INTRODUCTION

Shawn Woodall was arrested for possession of a controlled substance approximately twelve days after serving forty-six months' imprisonment for alien smuggling and escaping from federal prison.<sup>3</sup> The following facts, which the government did not dispute, were introduced at Woodall's sentencing:

[Thirty] days before his release [Woodall] had asked to have his probation moved from California—where he had no ties—to Oklahoma where his family lived. He claims that he spoke with a correctional center authority and wrote a letter to the probation department claiming "I am about to get out of prison . . . It's on a Friday. I do not want to be released in the community with no assets. No money. Just the clothes on my back. No identification. No nothing." However, he received no assistance. Woodall wrote a letter to his sentencing court, expressing his concern. He sought halfway house placement, or money, neither of which he obtained. Woodall states that once he was released, with no money or housing, he went to his probation department to explain that he was homeless and needed a transfer or assistance. He was told that his probation officer was on vacation and was given no assistance. He claimed that "on April 7th, I am on the streets living in a blanket on the streets in San Diego on a sidewalk with nothing. After 46 months of imprisonment with not a penny in my pocket. I am in a drug infested neighborhood."<sup>4</sup>

Woodall is not alone.<sup>5</sup> Over 700,000 prisoners were released into their communities in 2008, at least 50,000 of those from federal custody.<sup>6</sup> Absent adequate attention to transitional services such as housing, employment, and substance abuse treatment, empirical research has

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2. YOGI BERRA, *THE YOGI BOOK* 30 (Workman Publ'g 1998).

3. *Woodall v. Fed. Bureau of Prisons*, 432 F.3d 235, 238 (3d Cir. 2005).

4. *Id.* at 238 n.1.

5. See WILLIAM J. SABOL, HEATHER C. WEST & MATTHEW COOPER, *BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, BULL. NO. NCJ 228417, PRISONERS IN 2008* 1 (Dec. 2009, rev. June 30, 2010), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/p08.pdf>.

6. *Id.* at 3.

indicated that approximately two-thirds of released offenders will recidivate within three years.<sup>7</sup>

Once an obscure cause, nearly everyone agrees that prisoner reentry—the process by which former prisoners return to their community<sup>8</sup>—is of national importance.<sup>9</sup> Accordingly, President Obama and his two predecessors have devoted considerable attention to the issue.<sup>10</sup> Build-

7. PATRICK A. LANGAN & DAVID J. LEVIN, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, PUB. NO. 193427, SPECIAL REPORT: RECIDIVISM OF PRISONERS RELEASED IN 1994 1 (2002) [hereinafter LANGAN & LEVIN] (finding that over two-thirds of prisoners released in fifteen states in 1994 were rearrested within three years). See also Jeremy Travis, Anna Crayton & Debbie A. Mukamal, *A New Era in Inmate Reentry*, CORRECTIONS TODAY, Dec. 2009, at 38, 39 (“[T]he recidivism rate of returning prison inmates is very high. If recidivism is defined as one or more arrests for new crimes over a period of time, then, according to BJS data, the three-year recidivism rate for individuals leaving state prisons is more than two-thirds. And about one-half of returning inmates are reincarcerated within that three-year period.”).

8. See Todd R. Clear, Elin Waring & Kristen Scully, *Communities and Reentry: Concentrated Reentry Cycling*, in PRISONER REENTRY AND CRIME IN AMERICA 179 (Jeremy Travis et al. eds., 2005).

9. Former Attorney General Janet Reno referred to prisoner reentry as “one of the most present problems we face as a nation.” Janet Reno, U.S. Att’y Gen., Remarks at John Jay College of Criminal Justice on the Reentry Court Initiative (Feb. 10, 2000), <http://www.usdoj.gov/archive/ag/speeches/2000/doc2.htm>. See Mitchel Herckis & Katie Seeger, *One Year After Second Chance Act: New Funds to Stop the Prison Cycle*, NATION’S CITIES WKLY., Mar. 9, 2009, at 9 (“Once a cause with few advocates, the need for transitional services for ex-offenders has become glaring with an estimated 650,000 people released from prison and another 10 to 12 million people released from local jails each year.”). A number of local, state and national organizations are dedicated to prisoner reentry. See, e.g., BOONE CNTY OFFENDER TRANSITION NETWORK, <http://bcotn.org/> (last visited Feb. 5, 2011); RE-ENTRY PRISON AND JAIL MINISTRY RES. CTR., <http://reentry.org/> (last visited Feb. 5, 2011); *Missouri Reentry Process*, MO. DEP’T OF CORR., <http://doc.mo.gov/mrp/mrp.php> (last visited Feb. 5, 2011); *Reentry*, OFFICE OF JUSTICE PROGRAMS, <http://www.reentry.gov/> (last visited Feb. 5, 2011); *Reentry Resource Map*, OFFICE OF JUSTICE PROGRAMS, <http://www.reentryresources.ncjrs.gov/> (last visited Feb. 5, 2011); *Reentry Policy Council*, JUSTICE CTR., <http://reentrypolicy.org/> (last visited Feb. 5, 2011); *The National Reentry Resource Center*, JUSTICE CTR., <http://www.nationalreentryresourcecenter.org/> (last visited Feb. 5, 2011); THE SENTENCING PROJECT, <http://www.sentencingproject.org/template/index.cfm> (last visited Feb. 5, 2011).

10. Herckis & Seeger, *supra* note 9 (“President Obama is also supportive of reentry programs and included \$75 million for the Second Chance Act in his FY 2010 budget proposal”); President George W. Bush, Address Before a Joint Session of the Congress on the State of the Union (Jan. 20, 2004), available at [http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=2004\\_presidential\\_documents&docid=pd26ja04\\_txt-10](http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=2004_presidential_documents&docid=pd26ja04_txt-10) (“This year, some 600,000 inmates will be released from prison back into society. We know from long experience that if they can’t find work, or a home, or help, they are much more likely to commit crimes and return to prison. So tonight, I propose a 4-year, \$300 million Prisoner Re-Entry Initiative to expand job training and placement services, to provide transitional housing, and to help newly released prisoners get mentoring, including from faith-based groups.”); Anthony C. Thompson, *Navigating the Hidden Obstacles to Ex-Offender Reentry*, 45 B.C. L. REV. 255, 260 (2004) (“In the 2000–2001 federal budget, then President Bill Clinton included \$60 million for ‘Project Reentry,’ a federal program designed to encourage

ing on this national awareness, Congress passed the Second Chance Act,<sup>11</sup> with the goals of decreasing recidivism and increasing public safety. To accomplish these twin goals, Congress created new programs and revamped existing ones in a concerted effort to improve offender reentry. One notable change was the clarification of the Bureau of Prisons' inmate placement authority, which specified where an inmate can be placed and for how long.

Under the Second Chance Act, Congress required the Bureau of Prisons to ensure that a prisoner spends as much of his last twelve months as possible "under conditions that will afford [them] a reasonable opportunity to adjust to and prepare for the reentry . . . into the community, [and that such] conditions may include a community correctional facility."<sup>12</sup> This clarification did two things. First, it settled the question of whether the Bureau of Prisons is allowed to place inmates in community correctional facilities such as halfway houses. Second, it increased the length of time that inmates are eligible to spend in such facilities to up to twelve months. However, the Bureau of Prisons promulgated a new rule that effectively ignored Congress' intent and once again categorically limited inmates' time in halfway houses, a course of action that some courts previously found violated the agency's statutory authority.<sup>13</sup>

The Bureau of Prisons' new rule limits an inmate's halfway house placement to six months, unless there is an extraordinary justification requiring a longer placement and the inmate has received prior written approval from the Regional Director where the inmate is housed<sup>14</sup>

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parental responsibility among offenders, job training for parolees, and the establishment of reentry courts.").

11. Second Chance Act of 2007, Pub. L. No. 110-199, 122 Stat. 657 (2008) (codified in scattered sections of 18 and 42 U.S.C.), not to be confused with Second Chance for Ex-Offenders Act of 2009, H.R. 1529, 111th Cong. (2009) (permitting the expungement of records for certain nonviolent criminal offenses).

12. Second Chance Act of 2007 § 251. Community Correctional facilities or Community Corrections Centers ("CCC's") are also known as halfway houses and Residential Reentry Centers ("RRC's"). In this Article, I use the term halfway house. *Federal Prisoner Reentry and the Second Chance Act Before the Subcomm. on Commerce, Justice, Science and Related Agencies and the Comm. on Appropriations U.S House of Representatives*, 111th Cong. (2009) (statement of Harley G. Lappin, Director, Federal Bureau of Prisons) [hereinafter Lappin statement of March 10, 2009].

13. See *infra* Part II.B.

14. Memorandum from Joyce K. Conley, Assistant Dir. Corr. Programs Div. & Kathleen M. Kenney, Assistant Dir./Gen. Counsel to Chief Exec. Officers, Pre-Release Residential Re-Entry Center Placements Following the Second Chance Act of 2007 § III(D)(Apr. 14, 2008)[hereinafter Conley & Kenney Memo] ("While the [Second Chance] Act makes inmates eligible for a maximum of 12 months pre-release RRC placements, Bureau experience reflects inmates' pre-release RRC needs can usually be accommodated by a placement of six months or less. Should staff determine an inmates' pre-release RRC placement may require greater than six months, the Warden must obtain the Regional Director's written concurrence before submitting the placement to the Community Corrections Manager.").

(hereinafter extraordinary justification exception rule).<sup>15</sup> The promulgation of this rule is not the first time that the Bureau of Prisons limited an inmate's halfway house placement.

In 2002, following a review of its longstanding "open transfer"<sup>16</sup> policy, the Bureau of Prisons adopted a rule limiting an inmate's halfway house placement to six months.<sup>17</sup> In 2005, responding to legal challenges, the Bureau of Prisons announced a rule as a "categorical exercise of discretion"<sup>18</sup> that also limited halfway house placement to six months.<sup>19</sup> Several courts, applying *Chevron* and hard look review, concluded that the six-month time limit was impermissible then, and remains impermissible now.<sup>20</sup> In the immortal words of Yogi Berra, "It's déjà vu all over again."<sup>21</sup>

15. Pre-Release Community Confinement, 73 Fed. Reg. 62440 (Oct. 21, 2008) (codified at 28 C.F.R. § 570.20-22 (2008)). The Bureau of Prisons amended Community Corrections Center (CCC) Utilization and Transfer Procedure to inform its personnel of how to comply with the changes required by the Second Chance Act of 2007. FED. BUREAU OF PRISONS, U.S. DEP'T. OF JUSTICE, PROGRAM STATEMENT 7310.04, COMMUNITY CORRECTIONS CENTER UTILIZATION AND TRANSFER PROCEDURE (Dec. 16, 1998).

16. See *infra* Part I.A. for an in-depth discussion of the Bureau of Prisons' open transfer policy and the subsequent rule changes.

17. Memorandum from Michael B. Cooksey, Assistant Dir. Corr. Programs Div. and Christopher Erlewine, Assistant Dir./Gen. Counsel to Chief Exec. Officers, Community Confinement Procedure Changes (Dec. 20, 2002) [hereinafter Cooksey & Erlewine Memo] ("Pre-release programming CCC designations are limited in duration to the last 10% of the prison sentence, not to exceed six months.").

18. Community Confinement, 69 Fed. Reg. 51213 (Aug. 18, 2004) (codified at 28 C.F.R. § 570.20-.21 (2008)) ("[T]he Bureau of Prisons (Bureau) proposes new rules announcing its categorical exercise of discretion for designating inmates to community confinement when serving terms of imprisonment . . . The proposed rules would, as a matter of policy, limit the amount of time that inmates may spend in community confinement (including Community Corrections Centers (CCCs) and home confinement) to the last ten percent of the prison sentence being served, not to exceed six months."). See also *Woodall v. Fed. Bureau of Prisons*, 432 F.3d 235, 240 (3d Cir. 2005) ("In response to decisions such as *Elwood* and *Goldings*, on August 18, 2004, the BOP proposed new regulations 'announcing its categorical exercise of discretion for designating inmates to community confinement when serving terms of imprisonment.'") (referring to *Goldings v. Winn*, 383 F.3d 17 (1st Cir. 2004) and *Elwood v. Jeter*, 386 F.3d 842 (8th Cir. 2004)); *Levine v. Apker*, 455 F.3d 71, 75-76 (2d Cir. 2006) ("On August 18, 2004, the BOP . . . promulgated a new rule. This rule had the effect of imposing the same durational limitations on prisoner's CCC confinements as the BOP had implemented in its December 2002 Policy. It did so now . . . pursuant to the BOP's broad discretion to place inmates in community confinement . . .").

19. 69 Fed. Reg. 51213.

20. See *Wedelstedt v. Wiley*, 477 F.3d 1160 (10th Cir. 2007); *Fults v. Sanders*, 442 F.3d 1088 (8th Cir. 2006); *Woodall v. Fed. Bureau of Prisons*, 432 F.3d 235 (3d Cir. 2005). A final decision on whether the BOP could properly exercise such discretion was not heard because the 2005 Rule became moot with the passage of the Second Chance Act of 2007.

21. BERRA, *supra* note 2, at 30.

Unlike prior rule changes,<sup>22</sup> under this new rule federal inmates have been overwhelmingly denied judicial review because the federal courts adhere strictly to two doctrines—exhaustion<sup>23</sup> and mootness.<sup>24</sup> The courts' unwillingness to apply longstanding exceptions<sup>25</sup> to either doctrine, or to recognize a public importance exception<sup>26</sup> to the mootness doctrine, has prevented federal inmates from effectively challenging whether the extraordinary justification exception rule was a proper exercise of agency discretion. This Article analyzes the Bureau of Prisons' extraordinary justification exception rule under *Chevron* and the federal courts' application of the exhaustion and mootness doctrines. It concludes that, the extraordinary justification exception rule, once again is an impermissible exercise of agency discretion.

Part I of this Article details the Bureau of Prisons' rules and policies governing inmate placement, including the most recent iteration. Part II examines *Chevron*<sup>27</sup> and the Bureau of Prisons' extraordinary justification exception rule. Part III turns to the threshold matter of obtaining judicial access to challenge the Bureau of Prisons' new rule, with Part III.A arguing that the federal courts should relax their standards when faced with

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22. See *infra* Part I for an in-depth discussion of the numerous rule changes.

23. The exhaustion of administrative remedies doctrine requires an individual to submit a grievance to the agency's administrative remedy process before seeking relief from the courts. *McCarthy v. Madigan*, 503 U.S. 140, 145 (1992). There are a number of recognized exceptions to the doctrine: (a) statutory exceptions; (b) irreparable harm; (c) reconsideration or administrative appeals; (d) express or implied waiver; (e) futility; (g) manifest violation of constitutional rights; (h) purely legal issue; (i) procedural challenge; (j) challenge of bias or prejudice; (k) exercise of judicial discretion; and (l) unreasonable delay. 33 CHARLES ALAN WRIGHT & CHARLES H. KOCH, JR., *FEDERAL PRACTICE & PROCEDURE* § 8398 (2006). See *infra* Part IV.A.

24. The mootness doctrine prevents courts from deciding cases where a real controversy no longer exists and the court is unable to provide the effective relief being sought. *Arizonans for Official English v. Arizona*, 520 U.S. 43, 67 (1997) ("To qualify as a case fit for federal-court adjudication, 'an actual controversy must be extant at all stages of review, not merely at the time the complaint is filed.'" (quoting *Preiser v. Newkirk*, 422 U.S. 395, 401 (1975))); see also *Roe v. Wade*, 410 U.S. 113, 125 (1973); *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 241 (1937). See *infra* Part IV.B.

25. See *infra* Part III for a discussion of the exceptions that the courts have denied.

26. This exception has been adopted in state courts. See e.g., *State Bd. of Chiropractic Exam'rs v. Sjornholm*, 935 P.2d 959 (Colo. 1997); *Curless v. Cnty. of Clay*, 395 So. 2d 255 (Fla. Dist. Ct. App. 1981); *In re Adoption of Walgreen*, 710 N.E.2d 1226 (Ill. 1999); *Marquette v. Marquette*, 686 P.2d 990 (Okla. Ct. App. 1984). See also 1A C.J.S. *Actions* § 81 (2005) ("The courts construe narrowly the public interest exception to the mootness doctrine, which allows a court to resolve an otherwise moot issue if the question presented is of a public nature, the circumstances are likely to recur, and an authoritative resolution of the question is desirable for the purpose of guiding public officers."). Given the national importance of reentry, the federal courts should consider adopting this exception. See *infra* Part III.B.2 for a discussion of this exception and why the federal courts should adopt it.

27. See *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984).



exceptions to the exhaustion requirement and Part III.B arguing for the adoption of a federal public importance exception to the mootness doctrine. The Article concludes that these changes will further Congress' dual purposes for passing the Second Chance Act: decreasing recidivism and increasing public safety.

## I. HALFWAY HOUSE PLACEMENT POLICIES AND CHALLENGES

The Bureau of Prisons has changed its halfway house placement policy several times over the last decade. A detailed recounting of the Bureau of Prisons' policies, rules and challenges is below.

### A. *The Bureau of Prisons' Open Transfer Policy*<sup>28</sup>

The Bureau of Prisons' longstanding open transfer policy for halfway house placement consisted of two practices: early transfers and direct judicial placements.<sup>29</sup> With early transfers, an eligible inmate was placed in a halfway house at any point during his imprisonment and for any length of time<sup>30</sup> after spending a portion of his sentence in a federal prison. With direct judicial placement, an inmate was placed directly in a halfway house to serve his entire sentence, upon the recommendation of the sentencing court.<sup>31</sup> While the open transfer policy appeared to give the Bureau of

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28. The author of this Article has coined the phrase "open transfer policy" to reference the lack of temporal constraints only.

29. See Todd Bussert, Peter Goldberger & Mary Price, *New Time Limits on Federal Halfway Houses: Why and How Lawyers Challenge the Bureau of Prisons' Shift in Correctional Policy—And the Courts' Response*, 21 CRIM. JUST. 20, 22 (2006). Direct judicial placement is also referred to as "front-end" placement.

30. *Levine v. Apker*, 455 F.3d 71, 75 (2d Cir. 2006) ("Prior to the policy change in December 2002, the BOP interpreted its governing legislation such that the agency's general authority to designate places of imprisonment was 'not restricted by § 3624(c) in designating a CCC for an inmate and [that it could] place an inmate in a CCC for more than the "last ten per centum of the term," or more than six months, if appropriate.'"); *Woodall v. Fed. Bureau of Prisons*, 432 F.3d 235, 240 (3d Cir. 2005); *Goldings v. Winn*, 383 F.3d 17, 19–21 (1st Cir. 2004); *Elwood v. Jeter*, 386 F.3d 842, 844–45 (8th Cir. 2004); see also Amy L. Codagnone, Case Comment, *Administrative Law—Bureau of Prisons Statutory Mandate Permits Creation of Categorical Rules to Guide Prison Placement Discretion—Muniz v. Sabol*, 517 F.3d 29 (1st Cir. 2008, cert. denied, 129 S. Ct. 115 (2008)), 42 SUFFOLK U. L. REV. 285 (2009).

31. Jennifer Borges, *The Bureau of Prisons' New Policy: A Misguided Attempt to Further Restrict a Federal Judge's Sentencing Discretion and to Get Tough on White-Collar Crime*, 31 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 141, 142 (2005); John W. Roberts, *The Federal Bureau of Prisons: Its Mission, Its History, and Its Partnership with Probation and Pretrial Services*, 61 FED. PROBATION 53, 55 (1997) ("[J]udges are able to provide the BOP with rationales for particular sentencing decisions and even to recommend that inmates be designated to specific institutions or to institutions with specific types of programming. . . . Judicial recommendations are taken very seriously by the Bureau of Prisons as it makes decisions on

Prisons unfettered discretion when designating an inmate's place of imprisonment, two statutes have guided the agency's practice.<sup>32</sup>

Congress specifically required that the Bureau of Prisons, under § 3621(b), designate an inmate's place of imprisonment,<sup>33</sup> but granted the agency the discretion to determine the appropriate facility.<sup>34</sup> In making a facility determination, the Bureau of Prisons must consider five factors: "(1) facility resources; (2) the nature and circumstances of the offense; (3) the prisoner's history and characteristics; (4) statements by the sentencing court about the purpose of the sentence or recommending an appropriate facility; and (5) any pertinent policy statement issued by the Sentencing Commission."<sup>35</sup> By requiring consideration of these factors, Congress ensured that each inmate received an individualized assessment prior to being designated to a facility to serve his sentence.<sup>36</sup> The Bureau of Prisons interpreted its discretion under the statute to allow an inmate to be transferred at any time or placed directly in a halfway house.

To illustrate, assume that an inmate with a substance abuse problem and a history of prior convictions has been convicted of assaulting a federal officer. The Bureau of Prisons assesses whether there is a facility in a high security institution that has an opening, thus considering factors one through three. The Bureau of Prisons would also review any statements made by the sentencing court or any policy goals of the Sentencing Commission, thus considering factors four and five. After reviewing all of

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designations and programming. In fact, the BOP complies with about 80 percent of the judicial recommendations it receives."'). *But cf.* Adam J. Kolber, Essay, *The Subjective Experience of Punishment*, 109 COLUM. L. REV. 182, 195 (2009) ("Sentencing decisions are usually made by judges while decisions about conditions of incarceration are usually made by prison bureaucrats (under conditions that are generally less open, accountable, and reviewable than they are in the courtroom). Judges can recommend prison assignments, but at least in the federal system, the Bureau of Prisons is under no obligation to follow their recommendations. By giving primary responsibility for sentencing decisions to judges and primary responsibility for decisions about conditions of confinement to prison bureaucrats, we dramatically limit opportunities to calibrate punishments."').

32. 18 U.S.C. § 3621 (2010); 18 U.S.C. § 3624(c) (2010). *See generally* Ira P. Robbins, *Legal Dimensions of Private Incarceration*, 38 AM. U. L. REV. 531 (1989) (discussing how The Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, 98 Stat. 1839 (1984), replaced 18 U.S.C. § 4082 with 18 U.S.C. § 3621.).

33. 18 U.S.C. § 3621(b) (2010) ("The Bureau of Prisons shall designate the place of the prisoner's imprisonment.").

34. *Id.* ("The Bureau may designate any available penal or correctional facility that meets minimum standards of health and habitability established by the Bureau, whether maintained by the Federal Government or otherwise and whether within or without the judicial district in which the person was convicted, that the Bureau determines to be appropriate and suitable . . .").

35. *Id.* *See also* Robbins, *supra* note 32 at 759 ("Section 3621(b) merely sets forth certain additional factors that must be considered when the Bureau of Prisons selects a facility for a particular prisoner.").

36. COMMITTEE REPORT ON SENTENCING REFORM ACT, S. REP. NO. 98-225, at 141 (1983) (footnotes omitted), *reprinted in* 1984 U.S.C.C.A.N. 3182, 3324-25 (1984).

the information, the Bureau of Prisons identifies an appropriate facility for the inmate.<sup>37</sup> If the Bureau of Prisons determines that an inmate is better served in a halfway house, then according to its interpretation of § 3621(b), it is permitted either to transfer or to place that inmate directly into such a facility.

The other statute that governs halfway house placement, § 3624(c), focuses on the inmate's reentry back into the community.<sup>38</sup> This provision required the Bureau of Prisons to provide a set of conditions that would ensure that an inmate was prepared to reenter society upon release.<sup>39</sup> This statutory mandate, or "qualified" obligation,<sup>40</sup> required the Bureau of Prisons to assist an inmate in his reentry effort, but it neither dictated the extent of that effort nor provided a detailed reentry program. The Bureau of Prisons, interpreting this section as not limiting its discretion regarding where an inmate could be placed,<sup>41</sup> concluded that an inmate's placement in a halfway house was therefore not restricted.

To illustrate, assume that an inmate with an original sentence of forty months has only four months remaining and that the Bureau of Prisons has neither placed the inmate in a halfway house nor provided the inmate with a program designed to improve the inmate's chances of successfully

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37. The same process also occurs when the Bureau of Prisons honors a judicial recommendation for direct placement to a halfway house. See *Borges*, *supra* note 31, at 173 ("The BOP places great emphasis on the judicial recommendation and . . . [accepts] judicial recommendations about eighty percent of the time . . . which might explain why judges were so outraged when the DOJ announced that the BOP is no longer allowed to honor judicial recommendations.").

38. COMMITTEE REPORT ON SENTENCING REFORM ACT, *supra* note 36, at 141.

39. 18 U.S.C. § 3624(c) (2010); Crime Control Act of 1990, Pub. L. No. 101-647, § 2902, 104 Stat. 4789, 4913 (1990). See also *Goldings v. Winn*, 383 F.3d 17, 23 (1st Cir. 2004) ("By its plain language, § 3624(c) provides that the BOP 'shall take steps' to 'assure' that prisoners serve a reasonable part of the last ten percent of their prison terms 'under conditions that afford the prisoner a reasonable opportunity to adjust to and prepare for the prisoner's re-entry into the community.' This language imposes an affirmative obligation on the BOP to take steps to facilitate a smooth re-entry for prisoners into the outside world.").

40. *Goldings*, 383 F.3d at 23 ("It is true that this obligation is qualified. Section 3624(c) does not mandate placement in a CCC prior to release, and it requires the BOP to assure that a prisoner spends the last part of his sentence under pre-release conditions only if practicable.").

41. *Prows v. Fed. Bureau of Prisons*, 981 F.2d 466, 469 (10th Cir. 1992) ("While there is mandatory (albeit qualified) language employed in the statute [§ 3624(c)(1984)], it relates only to the general direction to facilitate the prisoner's post-release adjustment through establishment of some unspecified pre-release conditions. Nothing in § 3624(c) indicates any intention to encroach upon the Bureau's authority to decide where the prisoner may be confined during the pre-release period."); *Ferguson v. Ashcroft*, 248 F. Supp. 2d 547, 572 (M.D. La. 2003) ("The statute [section 3624(c)] clearly emphasizes the Bureau's duty to ensure a reasonable opportunity for a period of adjustment. It aims to relieve the burdens of direct release on our communities, the inmates, and their families. This section does not shrink the discretion granted the Bureau in 18 U.S.C. § 3621(b).").

reentering society. If the agency assesses the inmate according to the five factors enumerated above and determines that the inmate is ineligible to be transferred because no facility is available, then the Bureau of Prisons is not forced to place the inmate in a particular facility. The statute emphasizes that the agency must ensure that an inmate receives reentry programming “to the extent practicable.”<sup>42</sup> If this is not practicable, then no set of reentry conditions are required, including placement in a half-way house.<sup>43</sup>

The Bureau of Prisons’ open transfer policy operated for a substantial period of time,<sup>44</sup> but was changed abruptly following a determination that the policy was invalid.

### *B. Seismic Shift in the Bureau of Prisons’ Placement Policy*

Prompted by a request from the Deputy Attorney General,<sup>45</sup> the Office of Legal Counsel (“OLC”) found the Bureau of Prisons’ exercise of

42. 18 U.S.C. § 3624(c) (2010).

43. *Elwood v. Jeter*, 386 F.3d 842, 846–47 (8th Cir. 2004) (“Section 3624(c) clearly states that the BOP ‘shall’ ‘assure’ that each prisoner spends a reasonable part of the last ten percent of his or her term ‘under conditions that afford the prisoner a reasonable opportunity to adjust to and prepare for the prisoner’s re-entry into the community’ to the extent that this is practicable . . . We emphasize . . . that 18 U.S.C. § 3624(c) does not require placement in a CCC [or Community Corrections Center] . . . [T]he obligation is qualified by the phrase ‘to the extent practicable.’ Security concerns or space limitations in a CCC near the prisoner’s home are among the factors that may make it impractical to transfer a prisoner to a CCC for all or even part of the transition period.”). *See also Goldings*, 383 F.3d at 23.

44. *Iacaboni v. United States*, 251 F.Supp. 2d 1015, 1017 (D. Mass. 2003) (“In making the recommendations for community confinement, the court relied upon the definition of the BOP’s scope of discretion as set forth in § 3621(b). It also relied upon explicit instructions, regularly provided to judges in various formats, to the effect that community confinement is a proper sentencing option for offenders serving relatively modest terms of imprisonment. Finally, the court had in mind the fact that recommendations to community confinement have been made in thousands of cases by hundreds of judges continuously since at least 1965, and in nearly all instances accepted by the BOP”); *Borges*, *supra* note 31, at 142 (“Since at least 1965, federal judges have been allowed to make recommendations to the Bureau of Prisons to have prisoners serve their term of imprisonment in community confinement facilities, a practice that was almost always honored by the BOP”).

45. The Deputy Attorney General stated that he requested the review of the open transfer policy to determine whether it was legal.

It has come to my attention that the Federal Bureau of Prisons (BOP) has a policy of accommodating judicial requests (and occasionally acting on its own) to place low-risk, non-violent offenders with short terms of imprisonment in a community corrections center (CCC), even where such placement expressly contravenes the United States Sentencing Guidelines . . . I asked the Office of Legal Counsel (OLC) to assess the legality of [the] BOP’s practices.

discretion in placing inmates in halfway houses to be in error.<sup>46</sup> According to the OLC, the Bureau of Prisons incorrectly interpreted the statutes governing inmate halfway house placement. It noted that the Bureau of Prisons lacks the “general authority” either to transfer an inmate early or to place an inmate directly in a halfway house based upon a judicial recommendation.<sup>47</sup> To do so, the OLC contended, would be contrary not only to the agency’s statutory authority<sup>48</sup> but also to the Federal Sentencing Guidelines.<sup>49</sup>

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Memorandum from Larry D. Thompson, Deputy Attorney General, to Kathleen Hawk Sawyer, Director Federal Bureau of Prisons (Dec. 16, 2002), <http://www.justice.gov/dag/readingroom/imprisonment/htm> [hereinafter Thompson Memo]. It has been suggested that the inquiry was in response to concerns that the Bureau of Prisons’ placement policy favored white-collar offenders. See Bussert et al., *supra* note 29, at 22–23. (“Thompson added that ‘[a]nother concern regarding BOP’s CCC placement policies is its potentially disproportionate, and inappropriately favorable, impact on so-called ‘white-collar’ criminals,’ concluding . . . ‘[The] BOP’s current placement practices run the risk of eroding public confidence in the federal judicial system. White-collar criminals are no less deserving of incarceration, if mandated by the Sentencing Guidelines, than conventional offenders.’”).

46. Bureau of Prisons Practice of Placing in Community Confinement Certain Offenders Who have Received Sentences of Imprisonment, Op. O.L.C., 2002 WL 31940146, at \*5 (Dec. 13, 2002) [hereinafter OLC Memo] (“[S]ection 3621(b) gives BOP broad discretion to designate as ‘the place of the prisoner’s imprisonment’ ‘any available penal or correctional facility that meets minimum standards of health and habitability . . . [and] that [BOP] determines to be appropriate and suitable.’ But the authority to select the *place* of imprisonment is not the same as the authority to decide *whether* the offender will be imprisoned.”).

47. *Id.*, 2002 WL 31940146, at \*1.

48. *Id.* (“Your office [the Office of the Attorney General] has asked us to advise you whether the BOP has general authority, either upon judicial recommendation or otherwise, to place such an offender [low-risk, nonviolent] directly in community confinement at the outset of his sentence or to transfer him from prison to community confinement during the course of his sentence. . . . Community confinement does not constitute imprisonment for purposes of a sentencing order, and [the] BOP lacks clear general statutory authority to place in community confinement an offender who has been sentenced to a term of imprisonment. [The] BOP’s practice is therefore unlawful.”). See also Bussert et al., *supra* note 29, at 22.

49. The Office of Legal Counsel determined that the Bureau of Prisons was not permitted to place inmates into halfway houses because it would be a disharmonious interpretation of the Sentencing Reform Act of 1984. “Both [the] BOP’s authority under title 18 to implement sentences of imprisonment and the federal courts’ sentencing authority under the Guidelines were conferred by the Sentencing Reform Act of 1984. It is therefore especially appropriate that they be construed to produce a harmonious interpretation.” OLC Memo, *supra* note 46. In reaching this conclusion, the Office of Legal Counsel noted that “[F]ederal courts violate the Guidelines if they order . . . that an offender sentenced to a . . . simple sentence of imprisonment serve his sentence in community confinement, or . . . that an offender sentenced to a . . . split sentence serve the imprisonment portion of his sentence in community confinement.” *Id.* This conclusion was reached because under section 5C1.1 of the United States Sentencing Guidelines, community confinement does not constitute imprisonment. See *United States v. Adler*, 52 F.3d 20, 21 (2d Cir. 1995) (discussing the difference between imprisonment and commu-

Specifically, the OLC asserted that the Bureau of Prisons' interpretation of § 3621(b) as an authorization of "unlimited placements"<sup>50</sup> in halfway houses rendered the time limits provided in § 3624(c) "meaningless."<sup>51</sup> Apart from the Bureau of Prisons' misguided statutory interpretation, the OLC also noted that a halfway house did not qualify as a place of imprisonment.<sup>52</sup> The language of § 3621(b), "any penal or correctional facility,"<sup>53</sup> appears to include halfway houses as proper designations for an inmate. The OLC disagreed, noting that the question of whether a halfway house was a place of imprisonment had not been settled.<sup>54</sup> Based on these reasons, the OLC determined that the Bureau of

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nity confinement); *United States v. Swigert*, 18 F.3d 443, 445 (7th Cir. 1994) (stating that the Sentencing Guidelines distinguish between imprisonment and community confinement); *United States v. Voda*, 994 F.2d 149, 152 (5th Cir. 1993) (stating that "the term community corrections facility does not refer to jails . . ."); *United States v. Latimer*, 991 F.2d 1509, 1513 (9th Cir. 1993) (remarking that the division between imprisonment and community confinement is made plain in section 5C1.1).

50. See 69 Fed. Reg. 51213 (Aug. 18, 2004) (codified at 28 C.F.R. § 570.20-21 (2009)).

51. *Id.* ("[The] OLC concluded that, if the Bureau designated an offender to serve a term of imprisonment in a [Community Corrections Center], such designation unlawfully altered the actual sentence imposed by the court, transforming a term of imprisonment into a term of community confinement. [It] concluded that such alteration of a court-imposed sentence exceeds the Bureau's authority to designate a place of imprisonment. [The] OLC further opined that if section 3621(b) were interpreted to authorize unlimited placements in CCCs, that would render meaningless the specific time limitations in 18 U.S.C. 3624(c).").

52. OLC Memo, *supra* note 46.

53. See *Reno v. Koray*, 515 U.S. 50, 62 (1995) (referring to the FED. BUREAU OF PRISONS, U.S. DEPT. OF JUSTICE, PROGRAM STATEMENT 7310.02, (Oct. 19, 1993) "interpreting 18 U.S.C. § 3624(c) to allow BOP to place sentenced prisoners in community corrections centers, since such centers meet 18 U.S.C. § 3621(b)'s definition of a 'penal or correctional facility'"); *Ferguson v. Ashcroft*, 248 F. Supp. 2d 547, 566-67 (M.D. La. 2003) ("It is . . . obvious, without going far, that a community corrections center is a penal or correctional institution. . . . [A] penal facility is a facility to which people are committed as a form of punishment. . . . [T]he court finds that CCCs are facilities for the purpose of punishment, rehabilitation, or correction."); U.S. SENTENCING COMMISSION & FEDERAL BUREAU OF PRISONS, JOINT REPORT TO CONGRESS: MAXIMUM UTILIZATION OF PRISONS RESOURCES, 9-10 (June 30, 1994); Statutory Authority to Contract With the Private Sector for Secure Facilities, 16 Op. O.L.C. 65, 69, 1992 WL 479543, at \*\*3 (Mar. 25, 1992) ("[T]here is evidence in the legislative history of section 3621(b) that at least after a 1965 amendment Congress specifically anticipated that [the] BOP would designate privately operated facilities as places of incarceration. In 1965 Congress amended the designation provision to allow designation of a 'facility'. . . . The word 'facility' was defined to 'include a residential community center.'") (citation omitted).

54. *Goldings v. Winn*, 383 F.3d 17, 32 (1st Cir. 2004) (noting that a prior Office of the Legal Counsel opinion had not addressed whether a CCC is a 'place of . . . imprisonment' (citing OLC Memo, *supra* note 46). *But see Goldings*, 383 F.3d at 28 ("[T]he OLC's interpretation of 'place of imprisonment' as exclusive of CCCs relied primarily on a line of cases in which courts have held that confinement in a CCC is not imprisonment as that term is used in 5C1.1 of the United States Sentencing Guidelines, which governs the

Prisons' policy was unlawful, and recommended a new rule, which the Department of Justice ("DOJ") readily adopted.<sup>55</sup>

### 1. The 2002 Policy

The DOJ informed the Bureau of Prisons that it needed to "take all steps necessary to ensure that its sentencing placement decisions are in full compliance with the governing law."<sup>56</sup> More importantly, the DOJ informed the Bureau of Prisons that its policy gave the perception that white-collar offenders were receiving preferential treatment either by being transferred early during their imprisonment<sup>57</sup> or by being placed directly in halfway houses. Both practices were considered to be in direct conflict with a significant purpose of the Sentencing Guidelines, i.e., the removal of bias from federal sentencing practices.<sup>58</sup> "On this basis, it was

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kinds of sentences that may be imposed by courts for offenders within Zone C or D of the Guidelines. Although we recently joined this line of authority, we cautioned that 'our interpretation of imprisonment does not necessarily apply to provisions [of the Sentencing Guidelines] other than § 5C1.1.' . . . [T]o the extent that § 3621(b) conflicts with a section of the Sentencing Guidelines, the Guidelines must yield. . . . [The Guidelines] do not address the BOP's use of its discretion as the custodian of federal prisoners to designate the appropriate place of imprisonment.") (citations omitted).

55. 69 Fed. Reg. 51213 (Aug. 18, 2004) (codified at 28 C.F.R. § 570.20-.21 (2008)) ("By memorandum dated December 16, 2002, the Deputy Attorney General adopted the OLC memorandum's analysis and directed the Bureau to conform its designation policy accordingly.").

56. Thompson Memo, *supra* note 45. In addition to the prospective change in policy, the Department of Justice also required the Bureau of Prisons to apply the new policy retroactively and return all inmates that had been transferred to halfway houses back to federal facilities. "In addition, [the] BOP should transfer to an actual prison facility all federal offenders currently residing in a [Community Corrections Center] who, as of today [December 16, 2002], have more than 150 days remaining on the imprisonment component of their sentence." *Id.*

57. *Id.* ("Another concern regarding Bureau of Prisons' CCC placement policies is its potentially disproportionate, and inappropriately favorable, impact on so-called 'white collar' criminals."). See also Borges, *supra* note 31, at 142-43 ("The goal of the new policy was to help secure stricter penalties for white-collar offenders and to quash criticism that the administration had been soft on corporate criminals."). But see Todd A. Bussert, *NACDL Helps Members Fight Changes in Bureau of Prisons Policy*, CHAMPION, Mar. 2003, at 8, 8. Eric Lichtblau, *Criticism of Sentencing Plan For White-Collar Criminals*, N.Y. TIMES, Dec. 26, 2002, at C2 ("The officials said that halfway houses have been used for nonviolent offenders for at least 20 years. 'The point is that it's not just white-collar offenders who have benefited from this longstanding practice,' said Judy Garrett, a spokeswoman for the bureau. 'There are a lot of drug offenders, single moms and ordinary folks who aren't wealthy people who have benefited from this. It's not just Enron types.'").

58. OLC Memo, *supra* note 46 ("The Sentencing Guidelines were promulgated by the U.S. Sentencing Commission pursuant to the mandate of the Sentencing Reform Act of 1984, which sought to eliminate arbitrary discrepancies in federal sentencing."); Larry M. Fehr, Statement Before the United States Sentencing Commission, Northwest Regional Hearing: The Sentencing Reform Act of 1984: 25 Years Later (May 28, 2009),

concluded that this class of offenders was given more lenient treatment than other offenders because of their socioeconomic status.”<sup>59</sup>

In 2002, the Bureau of Prisons responded. It adopted a new rule (hereinafter the 2002 Rule) that incorporated three substantive changes to its existing open transfer policy.<sup>60</sup> First, the Bureau of Prisons maintained that an inmate would not be transferred to a halfway house until he had reached the final ten percent of his term of imprisonment.<sup>61</sup> Second, it limited the maximum amount of time that an inmate could spend in a halfway house to six months.<sup>62</sup> Finally, it ended the practice of honoring direct judicial placement recommendations.<sup>63</sup>

The response to the 2002 Rule was mixed.<sup>64</sup> For example, some courts, practitioners, and members of the public were outraged because they viewed the 2002 Rule as an encroachment upon the sentencing practices of federal judges.<sup>65</sup> Indeed, the new Rule spawned a flurry of legal challenges by those who maintained that it disrupted the longstanding practices of early transfers and direct judicial placements.<sup>66</sup>

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available at [http://www.ussc.gov/Legislative\\_and\\_Public\\_Affairs/Public\\_Hearings\\_and\\_Meetings/20090527-28/Fehr\\_testimony.pdf](http://www.ussc.gov/Legislative_and_Public_Affairs/Public_Hearings_and_Meetings/20090527-28/Fehr_testimony.pdf) (stating that a purpose of the Sentencing Reform Act embodied in the guidelines was to decrease the disparity in sentencing based upon the nature and type of the offense).

59. Thompson Memo, *supra* note 45.

60. There was some debate as to whether the 2002 Rule was a legislative rule or an interpretive one. Courts have decided that the 2002 Rule was a legislative rule and not interpretive. See *Monahan v. Winn*, 276 F. Supp. 2d 196, 215 (1st Cir. 2003) (“This is no mere effort at interpretive guidance but rather a rulemaking exercise designed to reshape the scope of a statutory provision through an administrative statement of lawmaking.”) (citation omitted); *id.* at 215 n.14 (“It is of no consequence that the BOP’s prior conclusion that it could place offenders directly into community confinement . . . was not a ‘legislative’ rule adopted through notice and comment. The prior practice did not ‘bind’ anybody and simply announced the manner in which the BOP intended to exercise discretion under its statutory duty of designating offenders to facilities. . . . The new rule . . . purports to be legally binding and dramatically curtails the BOP’s discretion in a way that is not obvious in the law itself.”); see also *Ashkenazi v. Att’y Gen. of the United States*, 246 F. Supp. 2d 1, 6 n.9 (D.D.C. 2003) (“[I]rrespective of the BOP’s characterization of its policy, the new policy has the force of law and is not merely interpretive. . . . The new rule is . . . not flexible and does not permit BOP to exercise any discretion.”).

61. Borges, *supra* note 31, at 175; Yana Dobkin, Note, *Cabining the Discretion of the Federal Bureau of Prisons and the Federal Courts: Interpretive Rules, Statutory Interpretation, and the Debate over Community Confinement Centers*, 91 CORNELL L. REV. 171, 184 (2005).

62. Borges, *supra* note 31, at 175; Dobkin, *supra* note 61, at 184.

63. Borges, *supra* note 31, at 175.

64. 69 Fed. Reg. 51213 (Aug. 18, 2004) (codified at 28 C.F.R. § 570 (2008)). (“The Bureau’s change was challenged in the Federal courts. District courts addressing the legality of the Bureau’s changed policy have been sharply divided.”).

65. Dobkin, *supra* note 61, at 174–75.

66. Bussert et al., *supra* note 29, at 20 (“Prisoners, lawyers, and judges reacted quickly to the news that BOP would not honor judicial recommendations for halfway house placements. BOP found itself defending a raft of lawsuits and attending resentencings.”). For courts that were dissatisfied with the prohibition against accepting direct judicial



However, not all members of the judiciary viewed the 2002 Rule with disfavor. A number of courts concluded that the 2002 Rule was a proper exercise of agency discretion, reiterating the OLC's position that a halfway house was not a place of imprisonment.<sup>67</sup> Federal inmates challenged the new rule on the ground that the Bureau of Prisons' interpretation of its two guiding statutes was erroneous.<sup>68</sup>

#### *a. Challenging the 2002 Rule*

The 2002 Rule changed the Bureau of Prisons' practice of transferring an inmate to a halfway house early during his sentence. For Morris Goldings, who was convicted of tax fraud and sentenced to thirty-six months, this change disturbed a well-established practice.<sup>69</sup> Approximately three months into his sentence, the 2002 Rule was adopted<sup>70</sup> changing his date of eligibility for transfer to a halfway house and reducing the length of time that he could spend in a halfway house from six to three and a half months. Goldings challenged the 2002 Rule on several grounds, most importantly that it was an erroneous interpretation of §§ 3621(b) and 3624(c).<sup>71</sup>

The respondents<sup>72</sup> first argued that a halfway house was not a place of imprisonment under § 3621(b), and therefore that the Bureau of Prisons' statutory discretion did not extend to placing an inmate in a halfway house "either at the outset or at the end of [a] prisoner's term."<sup>73</sup> Second, they claimed that § 3624(c) alone governed an inmate's halfway house placement.<sup>74</sup> Finally, the Bureau of Prisons contended that the 2002 Rule

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placements, see *Monahan v. Winn*, 276 F. Supp. 2d 196, 199–200 (1st Cir. 2003); *Iacaboni v. United States*, 251 F. Supp. 2d 1015, 1018 (D. Mass. 2003); *Byrd v. Moore*, 252 F. Supp. 2d 293 (W.D. N.C. 2003).

67. See, e.g., *Cohn v. Fed. Bureau of Prisons*, 302 F. Supp. 2d 267, 272 (S.D.N.Y. 2004) ("[T]he Bureau of Prisons' interpretation that a [Community Corrections Center] is not a place of imprisonment, and therefore not subject [to] Congress' general grant of discretion to the Bureau of Prisons under § 3621(b), is at a minimum a permissible interpretation of the statute."); *Benton v. Ashcroft*, 273 F. Supp. 2d 1139, 1141 (S.D. Cal. 2003).

68. See, e.g., *Goldings v. Winn*, 383 F.3d 17, 20, 24 (1st Cir. 2004) (challenging the application of the 2002 Rule as an Ex Post Facto violation); *Elwood v. Jeter*, 386 F.3d 842, 847 (8th Cir. 2004); *Monahan*, 276 F. Supp. 2d at 204; *Moore*, 252 F. Supp. 2d 299; *Iacaboni*, 251 F. Supp. 2d at 1015.

69. *Goldings*, 383 F.3d at 19.

70. *Id.* at 20.

71. *Id.* at 20–21 (noting that Goldings also challenged the new rule on the grounds that it violated the Administrative Procedure Act because it was adopted without notice and comment, as well as the Ex Post Facto clause and Due Process clauses of the United States Constitution because of its retroactive application).

72. The defendants in this case were the warden of the prison where Goldings was housed and Attorney General John Ashcroft. *Id.* at 17.

73. *Id.* at 22.

74. *Id.*

was an interpretive one, entitling it to an appropriate level of deference and placing it beyond judicial review.<sup>75</sup>

The district court dismissed the complaint, distinguishing it from other challenges to the 2002 Rule. The court noted that those cases focused on the practice of direct judicial placements and not the early transfers of an inmate.<sup>76</sup> On appeal, the First Circuit disagreed with the lower court, concluding that it incorrectly relied on the respondents' claim that § 3624(c) was relevant while § 3621(b) was not.<sup>77</sup>

According to the First Circuit, the Bureau of Prisons' interpretation rewrote the "unambiguous language of § 3621(b)," <sup>78</sup> which clearly gives the agency the discretion to designate an inmate's place of imprisonment to "any penal or correctional facility."<sup>79</sup> In making this determination, the First Circuit analyzed each statute under *Chevron*.<sup>80</sup>

Reviewing the plain language of § 3624(c), the First Circuit determined that the statute contained a qualified "affirmative obligation" that required the Bureau of Prisons to provide reentry assistance to each inmate.<sup>81</sup> Section 3624(c) "operates as a legislative directive focusing on the development of conditions to facilitate an inmate's adjustment to free society, whatever the institution of pre-release confinement."<sup>82</sup> This directive permitted the Bureau of Prisons to place an inmate in a halfway house earlier in his sentence if warranted.<sup>83</sup> After determining that § 3624(c) did not bar an inmate's early transfer, the First Circuit concluded that the Bureau of Prisons had the discretion to effectuate such transfers under § 3621(b).<sup>84</sup>

The first sentence of § 3621(b) required the Bureau of Prisons to designate the place of imprisonment,<sup>85</sup> which is statutorily defined as "any

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75. *Monahan v. Winn*, 276 F.Supp. 2d 196, 214 (1st Cir. 2003) ("Legislative rules are shaped through notice and comment but thereafter are entitled to deference in the courts under the principles of [*Chevron*]. Interpretative rules . . . are subject to multiple layers of review in agency adjudication and much more expansive review in the courts.") (citations omitted). See also *United States v. Mead Corp.*, 533 U.S. 218 (2001) (confirming that *Chevron* deference does not apply to non-legislative rules).

76. *Goldings*, 383 F.3d at 22 (noting the District Court distinguished two other cases decided in the district which criticized application of the BOP policy on the ground that those cases involved assignments to a CCC at the beginning of a defendant's sentence and were governed by 18 U.S.C. §§ 3621(b) and 3625. In contrast, *Goldings* involves transfer to a CCC at the end of the sentence, and is accordingly governed by 18 U.S.C. § 3624(c)).

77. *Id.* at 22. On appeal, the defendants dropped this argument.

78. *Id.* at 23.

79. *Id.* at 25.

80. *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984).

81. *Goldings*, 383 F.3d at 23.

82. *Id.* (citing *Prows v. Fed. Bureau of Prisons*, 981 F.2d 466, 470 (10th Cir. 1992)).

83. *Id.* at 24.

84. *Id.* at 25.

85. *Id.*

available penal or correctional facility,”<sup>86</sup> for those who have been committed to its custody.<sup>87</sup> The First Circuit explained that, because a halfway house satisfies this open-ended definition of what constitutes a place of imprisonment, the Bureau of Prisons was allowed to place an inmate in such a facility “prior to the lesser of the last six months or ten percent of his term of imprisonment.”<sup>88</sup>

The First Circuit held that the Bureau of Prisons was authorized to transfer an inmate at any time during his sentence and that the transfer was not restricted to the time limits contained in § 3624(c).<sup>89</sup> Other challenges focused on the 2002 Rules prohibiting direct judicial placements.

### *b. Challenging the Denial of Direct Judicial Placements*

In *Iacoboni v. United States*,<sup>90</sup> two of the petitioners were serving sentences in a halfway house while another was waiting to be sentenced.<sup>91</sup>

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86. *Id.* (citing *United States v. King*, 338 F.3d 794, 798 (7th Cir. 2003) (“Under 18 U.S.C. § 3621(b), the BOP is authorized to house a prisoner . . . anywhere it deems appropriate.”); *Prows*, 981 F.2d at 469 n.3 (“Under 18 U.S.C. § 3621(b), the Bureau of Prisons . . . may direct confinement in any available facility and may transfer a prisoner from one facility to another at any time.”)).

87. 18 U.S.C. § 3621(a) (2010) (“A person who has been sentenced to a term of imprisonment . . . shall be committed to the custody of the Bureau of Prisons . . . .”); *id.* § 3621(b) (“The Bureau of Prisons shall designate the place of the prisoner’s imprisonment.”).

88. *Goldings*, 383 F.3d at 26. *See also* Memorandum In Support of Amended Petition for Writ of Habeas Corpus at 11, *Pierce v. Thomas*, 2009 U.S. Dist. LEXIS 55696 (D. Or. July 1, 2009) (No. 08-705MA) [hereinafter Memorandum in Support of Amended Petition] (“Overwhelmingly, district courts granted relief, rejecting the OLC’s erroneous interpretation of § 3621(b) . . . The courts held that, as a matter of statutory construction, the plain language of § 3621(b) authorized placement and transfer of offenders to CCCs at any time during their terms of imprisonment.”).

89. *Goldings*, 383 F.3d at 29.

90. *Iacoboni v. United States*, 251 F.Supp. 2d 1015 (D. Mass. 2003).

91. *Id.* at 1017 (“In making the recommendations for community confinement, the court relied upon the definition of the Bureau of Prisons’ scope of discretion as set forth in § 3621(b). It also relied upon explicit instructions, regularly provided to judges in various formats, to the effect that community confinement is a proper sentencing option for offenders serving relatively modest terms of imprisonment. Finally, the court had in mind the fact that recommendations to community confinement have been made in thousands of cases by hundreds of judges continuously since at least 1965, and in nearly all instances accepted by the Bureau of Prisons.”); *see also* *Ferguson v. Ashcroft*, 248 F.Supp. 2d 547, 572 (M.D. La. 2003) (“[B]oth the [Office of Legal Counsel] . . . and [the] Government conclude that the section [3624(c)] demands that the Bureau never place anyone sentenced to a term of imprisonment of any kind to a [Community Corrections Center] . . . for more than ten percent of her term of imprisonment and, even then, never for more than six months . . . This portion of the Government’s rationale is almost worth preserving for the marvelous irony it foists upon the world . . . [T]he Government would have the court read this section as a stiff curb on the Bureau’s ability to make such placements at all. The court finds this reading to be implausible.”).

When the 2002 Rule was adopted, the Bureau of Prisons rescinded the halfway house placement of the two inmates who had been transferred and denied placement to the third. The inmates filed a petition claiming that the Bureau of Prisons' new policy was unlawful.<sup>92</sup> The court, reviewing the 2002 Rule under *Chevron*, agreed with the petitioners.<sup>93</sup>

The court first looked at the statutory text.<sup>94</sup> It found that the statute was clear and unambiguous, and that the Bureau of Prisons had exceeded its statutorily granted discretion.<sup>95</sup> In addition to finding that the Bureau of Prisons ignored its statutory mandate, the court looked at the larger societal policy that the open transfer policy served and considered the benefits of placing an inmate in a halfway house for the offender, the offender's family, and society at large.<sup>96</sup>

According to the court, placement in a halfway house provided the inmate with an opportunity to maintain contact with his family.<sup>97</sup> This was important because such contact has been identified as a key factor not only in reducing recidivism for the inmate,<sup>98</sup> but also for allowing the inmate to continue to take care of dependent family members and potentially helping to prevent his children from offending.<sup>99</sup> Moreover, the court recognized the economic benefit that arises from halfway house placement. An inmate

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92. *Iacaboni*, 251 F.Supp. 2d at 1017.

93. *Id.* at 1038–43 (holding that that the Bureau of Prisons' failure to allow for notice and comment and the retroactive application of the policy change are also in error).

94. *Id.* at 1024–26.

95. *Id.* at 1037–38 (“It has defined the scope of its discretion, as a matter of law, in a manner that is dramatically inconsistent with the plain language of the controlling statute. This is emphatically *not* a situation where the BOP has merely announced how it will, as a matter of policy, exercise its discretion by denying a designation. On the contrary, in two of the cases before the court, it *has* already exercised its discretion, but reversed course based on an incorrect assessment of the scope of its authority. The distinction is terribly important. The BOP may use its discretion in various ways; it may not, through an erroneous interpretation of its powers, attempt to divest itself of the discretion Congress has given it.”)(emphasis added).

96. *Id.* at 1022–23 (“[F]or the defendant . . . [i]mprisonment in a halfway house usually means the inmate will be residing closer to his or her home community, can continue employment outside the facility during the day, and can maintain ties with vulnerable family members, such as children or ailing parents. . . . When one remembers that persons placed in community corrections are generally minor offenders, with minimal or no criminal records, and no history of violence, the decision to entirely eliminate community corrections as an optional imprisonment designation becomes even more astonishing.”); see also JEREMY TRAVIS, BUT THEY ALL COME BACK: FACING THE CHALLENGES OF PRISONER REENTRY ch. 6 (2005).

97. *Iacaboni*, 251 F.Supp. 2d at 1022–23; see also TRAVIS, *supra* note 96, at ch. 6.

98. See TRAVIS, *supra* note 96, at ch. 6; JOAN PETERSILIA, WHEN PRISONERS COME HOME: PAROLE AND PRISONER REENTRY 141–46 (2003); Stephanie J. Millet, Note, *The Age of Criminal Responsibility in an Era of Violence: Has Great Britain Set a New International Standard?*, 28 VAND. J. TRANSNAT'L L. 295, 332 n.241 (1995) (“Most studies show that family contact helps to reduce recidivism rates.”).

99. See *Iacaboni*, 251 F.Supp. 2d at 1022–23; TRAVIS, *supra* note 96, at ch. 6; PETERSILIA, *supra* note 98, at 141–46.

placed in such a facility can continue to provide financial support to his family, thereby reducing the likelihood of future economic burden on the state and forestalling the possibility of the inmate's children being placed in foster care.<sup>100</sup> Apart from the benefits that accrue to the inmate and his family, society also reaps the rewards of halfway house placement. Because an inmate is required to work while in a halfway house, incarceration costs are reduced and taxpayers save money.<sup>101</sup> Based upon these reasons, the court determined that the 2002 Rule was misguided.

In response to these challenges, the Bureau of Prisons, pursuant to its rulemaking authority, adopted a new rule<sup>102</sup> that was substantively identical to the 2002 Rule.<sup>103</sup>

## 2. The 2005 Rule—A Categorical Exercise of Discretion

The Bureau of Prisons proposed an interim rule in 2005 that limited an inmate's halfway house placement to the final ten percent of his sentence, not to exceed a maximum of six months.<sup>104</sup> In response to earlier court decisions, the Bureau of Prisons promulgated this new rule as a categorical exercise of discretion (hereinafter the categorical exercise of discretion rule or 2005 Rule).<sup>105</sup> Prior to it becoming final, the Bureau of

100. *Iacoboni*, 251 F. Supp. 2d at 1022–23 (“For innocent third parties, particularly children, the economic and emotional devastation caused by a parent’s distant incarceration can be, to some extent, palliated. With the inmate employed, families can stay off welfare; with a parent available, children can avoid placement in foster homes.”).

101. *Id.* (“[T]he Number One beneficiary of community corrections is the American Taxpayer, since the cost of community confinement, when it serves the interests of justice, is far less than the price tag on more conventional forms of imprisonment.”).

102. *Fults v. Sanders*, 442 F.3d 1088, 1090 (8th Cir. 2006) (“In February 2005, in response to *Elwood* and a similar decision from the First Circuit, *Goldings v. Winn*, . . . the BOP created new regulations governing the placement of inmates in CCCs. These regulations state that the BOP was engaging in a ‘categorical exercise of discretion’ and choosing to ‘designate inmates to [CCC] confinement only . . . during the last ten percent of the prison sentence being served, not to exceed six months.’”) (citations omitted). *See also* *Levine v. Apker*, 455 F.3d 71 (2d Cir. 2006) (noting that the Bureau of Prisons promulgated the 2005 Rule in response to legal challenges to the 2002 Policy).

103. 69 Fed. Reg. 51213 (Aug. 18, 2004) (codified at 28 C.F.R. § 570 (2008)). (“The proposed rules would, as a matter of policy, limit the amount of time that inmates may spend in community confinement (including Community Corrections Centers (CCC)s and home confinement) to the last ten percent of the prison sentence being served, not to exceed six months . . . . The Bureau announces these rules as a categorical exercise of discretion under 18 U.S.C. 3621(b).”).

104. *Id.* (providing that a longer placement will be granted for certain statutory programs, such as substance abuse treatment. “The only exceptions to this policy are for inmates in specific statutorily-created programs that authorize greater periods of community confinement (for example, the residential substance abuse treatment program (18 U.S.C. 3621(e)(2)(A)) or the shock incarceration program (18 U.S.C. 4046(c)).”).

105. *Muniz v. Sabol*, 517 F.3d 29, 36 (1st Cir. 2008); *Wedelstedt v. Wiley*, 477 F.3d 1160, 1167 (10th Cir. 2007); *Levine v. Apker*, 455 F.3d 71, 83 (2d Cir. 2006) (“The Febru-

Prisons submitted the proposed rule for public notice and comment as required by the Administrative Procedure Act.<sup>106</sup>

None of the public comments that were submitted, many of which questioned both procedural and substantive elements of the rule, endorsed the Bureau of Prisons' prohibition against direct judicial placements or the ten percent/six-month time limits on when an inmate was eligible to be transferred. More importantly, the comments challenged the Bureau of Prisons' categorical exercise of discretion as ignoring the statutory mandate of § 3621(b) requiring an individualized assessment of each inmate.

Criticism of the 2005 Rule ranged from a lack of process in its promulgation to its impact on inmates and society at large. For example, some denounced the 2005 Rule because the agency had failed to hold "public hearings."<sup>107</sup> Others claimed that the 2005 Rule would have an "unreasonable economic impact" on both the private sector<sup>108</sup> and the government.<sup>109</sup> Others suggested that the prescribed amount of time that federal inmates were able to spend in a halfway house was insufficient to provide an inmate with the skills needed to reenter society successfully.<sup>110</sup> Although the Bureau of Prisons acknowledged these concerns,<sup>111</sup> it did not change the proposed rule that it eventually adopted as its final rule.<sup>112</sup> Once again, the Bureau of Prisons was challenged on the grounds that it violated its statutory mandate under § 3621(b). And once more, the result was a circuit split.<sup>113</sup>

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ary 2005 Rule at issue in this case, published at 28 C.F.R. § 570.20 and § 570.21, was announced as 'a categorical exercise of discretion under 18 U.S.C. § 3621(b).' As the agency explained when it proposed the rule: 'Because various courts have held that the Bureau has discretion under 18 U.S.C. § 3621(b) to place offenders sentenced to a term of imprisonment in CCCs, the Bureau considers it prudent to determine how to exercise such discretion.' "); *Woodall v. Fed. Bureau of Prisons*, 432 F.3d 235, 240 (3d Cir. 2005).

106. 5 U.S.C. § 553 (2011).

107. Community Confinement, 70 Fed. Reg. 1659 (Jan. 10, 2005) (codified at 28 C.F.R. pt. 570) (2008) ("Requests to hold a public hearing. Thirteen commenters requested the Bureau to hold a public hearing on the rule.").

108. *Id.* ("The rule has an unreasonable economic impact. Several commenters complained, both generally and specifically with regard to their particular community corrections business (CCCs), that the rule had an unfair economic impact . . .").

109. *Id.* ("The rule will increase Bureau costs by increasing the number of inmates housed in penal facilities.").

110. *Id.* ("The rule does not allow for inmates to have enough time to reintegrate into the community before release. Several commenters [sic] raised this concern.").

111. *Id.*

112. 70 Fed. Reg. 1659 (Jan. 10, 2005) (codified at 28 C.F.R. pt. 570 (2008)) ("The Bureau published proposed rules on this subject on August 18, 2004 (69 FR 51213). In the proposed rule document, we explained that these rules would, as a matter of policy, limit the amount of time that inmates may spend in community confinement (including Community Corrections Centers (CCCs) and home confinement) to the last ten percent of the prison sentence being served, not to exceed six months.").

113. In stark contrast to the First Circuit Court of Appeals, the Third, Eighth and Tenth circuits found that the Bureau of Prisons' actions constituted an impermissible

### 3. Challenging the 2005 Rule

#### *a. Impermissible Exercise of Discretion*

In *Woodall v. Federal Bureau of Prisons*,<sup>114</sup> the Third Circuit addressed the question of whether the Bureau of Prisons' 2005 Rule was a proper exercise of the agency's discretion.<sup>115</sup> The Third Circuit concluded that it was not.<sup>116</sup>

Woodall was initially sentenced to thirty-seven months for alien smuggling.<sup>117</sup> After he pled guilty to an escape charge, the court added an additional six months to his sentence.<sup>118</sup> Woodall was rearrested shortly after being released for possession of a controlled substance.<sup>119</sup> At his sentencing, Woodall asserted that his re-arrest was the direct result of being released back into society with "no money, no identification and no assets, into a community where he had no ties whatsoever."<sup>120</sup> He testified that prior to being released, his requests to various agencies for assistance were denied, thus contributing to his failure to reenter society without recidivating.<sup>121</sup>

The sentencing court, acknowledging the Bureau of Prisons' failure, amended Woodall's sentence and recommended that he be placed directly

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exercise of discretion. Compare *Wedelstedt v. Wiley*, 477 F.3d 1160 (10th Cir. 2007), *Fults v. Sanders*, 442 F.3d 1088 (8th Cir. 2006), and *Woodall v. Fed. Bureau of Prisons*, 432 F.3d 235 (3d Cir. 2005), with *Muniz v. Sabol*, 517 F.3d 29 (1st Cir. 2008). See generally Codagnone, *supra* note 30.

At the district court level, courts have been divided over whether the Bureau of Prisons can limit the placement of inmates to the lesser of ten percent of the sentence or six months. For cases upholding the policy, see, e.g., *Cohn v. Fed. Bureau of Prisons*, 302 F. Supp. 2d 267 (S.D.N.Y. 2004); *Benton v. Ashcroft*, 273 F. Supp. 2d 1139 (S.D. Cal. 2003). For cases rejecting the policy, see, e.g., *Monahan v. Winn*, 276 F. Supp. 2d 196 (1st Cir. 2003)); *Iacoboni v. United States*, 251 F. Supp. 2d 1015 (D. Mass. 2003); *Byrd v. Moore*, 252 F. Supp. 2d (W.D. N.C. 2003).

114. See *Woodall*, 432 F.3d 235.

115. The case is instructive not only because it represents the type of challenges to the 2005 Rule but because it also highlights the importance of reentry programming in assisting inmates to be successful upon release and in preventing recidivism.

116. *Woodall*, 432 F.3d at 246 ("The Senate report [S. REP. NO. 98-225 (1983), reprinted in 1984 U.S.C.C.A.N. 3182, 3324-25] supports the proposition that Congress did not intend to limit the BOP's overall placement discretion to 'designate the place of [a] prisoner's imprisonment.' However, it is also clear that, before exercising that discretion, the BOP 'should consider' each of the § 3621 factors. Because the 2005 regulations do not allow the BOP to consider the factors enumerated in § 3621, they are invalid.").

117. *Woodall*, 432 F.3d at 238.

118. *Id.*

119. *Id.*

120. *Id.*

121. *Id.* at 238 n.1.

in a halfway house.<sup>122</sup> With the recent adoption of the 2005 Rule, the Bureau of Prisons restricted his halfway house eligibility and length of stay until the final ten percent of his sentence or six months, whichever was less.<sup>123</sup> Challenging the 2005 Rule, Woodall claimed that the Bureau of Prisons was impermissibly ignoring the sentencing court's recommendations,<sup>124</sup> thus failing to give effect to the five factors in § 3621(b). The Bureau of Prisons responded that it was entitled to judicial deference<sup>125</sup> under *Lopez*.<sup>126</sup> The agency argued further that, although it considered the five factors when it promulgated the 2005 Rule,<sup>127</sup> it was not required to adhere to the factors because they were not mandatory.<sup>128</sup> Applying *Chevron*, the Third Circuit disagreed, concluding that *Lopez* was not controlling.<sup>129</sup>

In *Lopez*, the Court considered whether the Bureau of Prisons' interpretation of § 3621(e)<sup>130</sup> was valid. Under that section, which focuses on substance abuse treatment, the agency had the discretion to reduce the period of incarceration for an inmate who successfully completed a substance abuse program,<sup>131</sup> provided that the inmate had not been convicted of a violent offense.<sup>132</sup> In its interpretation of the statute, the Bureau of Prisons excluded all inmates who were convicted of firearm possession.

The Supreme Court held in *Lopez* that this interpretation was a proper exercise of discretion because there was no clear legislative directive defining the phrase "convicted of a nonviolent offense."<sup>133</sup> The Court held that while Congress authorized the Bureau of Prisons to reduce an inmate's sentence upon the completion of a substance abuse treatment program, Congress did not identify the specific "circumstance in which the Bureau either must grant the reduction, or is forbidden to do so."<sup>134</sup> Therefore, the Third Circuit reasoned that in *Lopez*, Congress was concerned about releasing violent inmates early and decided to allow

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122. *Id.* at 238 ("The Assistant United States Attorney on the case 'urged' that placement.").

123. *Id.* For Woodall, that amounted to a maximum of eleven weeks.

124. *Id.* at 238–39.

125. *Id.* at 244.

126. *Lopez v. Davis*, 531 U.S. 230, 244 (2001) (concluding that the Bureau of Prisons may "categorically exclude prisoners from substance abuse treatment programs based on their preconviction conduct."); see also Stephanie Marino, *Lopez v. Davis: Has the Bureau of Prisons Exceeded its Discretionary Power over Early Release Programs Enacted by Congress?*, 49 WAYNE L. REV. 1007 (2003).

127. *Woodall*, 432 F.3d at 249.

128. *Id.* at 244.

129. *Id.* at 246.

130. 18 U.S.C. § 3621(e) (2010).

131. *Id.* § 3621(e)(2)(B).

132. *Id.*

133. *Lopez v. Davis*, 531 U.S. 230, 242 (2001).

134. *Id.*



the Bureau of Prisons to clarify the provision.”<sup>135</sup> The Third Circuit explained further that in *Lopez*, the Bureau of Prisons’ interpretation “reflect[s] [Congress]’ concern and seem[s] to provide a way to advance it.”<sup>136</sup> Thus, the Bureau of Prisons was entitled to judicial deference, and all that remained for the Court was to assess whether the Bureau of Prisons’ interpretation was a reasonable one, which the Court found it to be.<sup>137</sup> According to the Third Circuit, the Court’s reasoning in *Lopez* did not apply to § 3621(b) because the 2005 Rule did not “further the factors in the BOP’s enabling statute—[it] reject[ed] them.”<sup>138</sup>

Congress provided the Bureau of Prisons with a set of factors in § 3621(b) to use when determining an inmate’s place of imprisonment.<sup>139</sup> While these factors required the Bureau of Prisons to conduct an individualized assessment of each inmate, § 3621(e)(2)(B)(the statute at issue in *Lopez*) did not.<sup>140</sup> When a statute lacks clarity, as was the case in *Lopez*, the Bureau of Prisons is permitted to provide its interpretation of the statute. The guiding statute for halfway house placement, unlike § 3621(e)(2), was not ambiguous. The Third Circuit concluded that the Bureau of Prisons’ actions directly contravened the express statutory language of § 3621(b), and therefore that the 2005 Rule was not entitled to judicial deference. The court added that the agency’s assertion that the five factors were considered prior to the promulgation of the 2005 Rule was further proof that the Bureau of Prisons’ actions were misguided and that the court should not defer to the agency’s judgment.

Congress enumerated the five factors in § 3621(b) with the express purpose of requiring the Bureau of Prisons to consider them prior to designating an inmate’s place of imprisonment. The Third Circuit concluded that the Bureau of Prisons’ argument, that the five factors were considered at the time the rule was promulgated, was without merit because it disregarded the requirement for an individualized assessment. According to the court,

The 2005 regulations do not allow the [Bureau of Prisons] to consider the nature and circumstances of an inmate’s offense . . . [the] history and pertinent characteristics, or . . . any statement by the sentencing court concerning a placement recommendation and the purposes for the sentence. . . . The regulations are invalid because the [Bureau of Prisons] may not categorically remove its ability to consider the explicit factors

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135. Woodall v. Fed. Bureau of Prisons, 432 F.3d 235, 246 (3d Cir. 2005).

136. *Id.*

137. *Lopez*, 531 U.S. at 242.

138. *Woodall*, 432 F.3d at 246.

139. *Id.* at 247.

140. *Id.*

set forth by Congress in § 3621(b) for making placement and transfer determinations.<sup>141</sup>

The Bureau of Prisons' reliance upon a categorical exercise of discretion as the basis for promulgating the 2005 Rule<sup>142</sup> was erroneous. By collapsing all five factors into one rule, the Bureau of Prisons created a standardized placement policy. In other words, the agency made a one-size-fits-all approach to determine halfway house eligibility and the length of placement, thereby disregarding the five factors enumerated in § 3621(b). The Bureau of Prisons therefore negated the statutorily mandated individualized assessment when it proclaimed that it properly engaged in a categorical exercise of discretion.<sup>143</sup> Under § 3621(b), the Third Circuit noted that the Bureau of Prisons must consider the "particular circumstances of individual inmates," and that the Bureau of Prisons cannot accomplish such an assessment with a "blanket rule."<sup>144</sup> Lastly, the court found that the requirement to consider the five factors was not discretionary.<sup>145</sup>

According to *Woodall*, the Bureau of Prisons is allowed to consider additional factors when making its placement determination. It is not permitted, however, to ignore the five factors.<sup>146</sup> The Bureau of Prisons may elect or refuse to transfer an inmate to a halfway house, relying upon other factors that are not listed, but it cannot do so without contemplating at the very least the five factors in § 3621(b). The Third Circuit explained that these factors are to be referenced whenever an inmate is placed, including placement into a halfway house.<sup>147</sup> The First Circuit did not agree, drawing the opposite conclusion.

#### *b. Permissible Exercise of Discretion*

In *Muniz v. Sabol*,<sup>148</sup> the First Circuit, also applying *Chevron*, found that the 2005 Rule was a valid exercise of the Bureau of Prisons' discretion.<sup>149</sup>

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141. *Id.* at 244; *but see id.* at 251 (Fuentes, J., dissenting); *Fults v. Sanders*, 442 F.3d 1088 (8th Cir. 2006) (Riley, J., dissenting).

142. *Woodall*, 432 F.3d at 244; *Fults*, 442 F.3d at 1089–90.

143. *Woodall*, 432 F.3d at 246–47.

144. *Id.* at 248.

145. *Id.* at 246–47.

146. *Id.* at 248–49.

147. *Id.* at 248.

148. *Muniz v. Sabol*, 517 F.3d 29, 35 (emphasis in original) (1st Cir. 2008) ("Applying *Lopez*, we discern no clear expression of congressional intent to foreclose rulemaking. As an initial matter, the *transfer* provision in § 3621(b) leaves more to the BOP's discretion than the *assignment* provision. But moreover, even the *assignment* provision lacks a clear expression of congressional intent to forbid rulemaking that assists BOP in its individualized determinations.")

149. *Id.* at 34–36. *See also* *Miller v. Whitehead*, 527 F.3d 752, 757 (8th Cir. 2008).

Beginning with the plain language of the statute, the First Circuit noted that there is no legislative guidance offered to determine whether the Bureau of Prisons was entitled to use a categorical exercise of discretion to promulgate a rule.<sup>150</sup> In the absence of clear congressional intent, the First Circuit found that the Bureau of Prisons was entitled to judicial deference. Since it was entitled to deference, the Bureau of Prisons' interpretation of § 3621(b) was reasonable because the rule was "promulgated with explicit reference to some of the five factors."<sup>151</sup> According to the First Circuit, because the five factors were considered when the rule was crafted, the Bureau of Prisons was acting in accord with § 3621(b), which gave it the discretion to designate an inmate's place of imprisonment.<sup>152</sup> Apart from the statutory text, the First Circuit also credited the Bureau of Prisons' effort at transparency.<sup>153</sup>

The court in *Muniz* acknowledged that the Bureau of Prisons has the discretion to determine an inmate's place of imprisonment. The First Circuit concluded that, in using its discretion, the Bureau of Prisons could claim that it conducted an individualized assessment of each inmate and found that no offender was eligible to be placed in a halfway house in excess of the ten percent/six-month time limit. The agency could effectively mask its policy of limiting placement by paying lip service to the § 3621(b) factors without actually engaging in an individualized assessment. The First Circuit noted that, instead of forcing the Bureau of Prisons to engage in this type of subterfuge by going through the motions and then denying placement, it was better to know at the outset that the agency exercised its categorical discretion to designate an inmate's placement.<sup>154</sup> Under the First Circuit's reasoning, the implication was that the Bureau of Prisons was permitted to act contrary to its statutory authority

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150. *Muniz*, 517 F.3d at 36.

151. *Id.* at 39.

152. *Id.* at 39–40 ("§ 3621 requires [the] BOP to consider the five factors in a much broader context: deciding what specific facility is the right one to house each prisoner. . . . This, then, is nothing more than a background rule of general applicability . . . . [T]he 2005 regulations were promulgated with explicit reference to some of the five factors. . . . Under the statute, other factors may be considered and may even be dispositive. . . . We believe this is in accordance with the BOP's ability to make rules of general applicability that guide its decisions. . . . Because the individualized consideration of the five factors mandated by 18 U.S.C. § 3621(b) is directed at the overall placement decision, and because the question of the appropriateness of CCCs for inmates during the first ninety percent of their sentences is an issue of general applicability within the scope of *Lopez*, the 2005 regulations are a reasonable exercise of the Bureau of Prisons' discretion in carrying out its duties under 18 U.S.C. § 3621(b).").

153. *Muniz*, 517 F.3d at 40 ("The 2005 regulations at least have the advantage of transparency. There is no dispute that, as long as the BOP 'considers' the five factors, it has virtually unlimited discretion to place inmates wherever it deems appropriate. The BOP could simply consider the five factors in each case but decide, in each case, not to place each inmate in a CCC.").

154. *Id.*

simply on the speculation that it might not ably or ethically perform its task.<sup>155</sup> Despite the First Circuit's holding, mere speculation alone should not absolve the Bureau of Prisons of its statutory authority to conduct an individualized assessment of each inmate prior to placement.

The division in the circuit courts regarding whether the Bureau of Prisons' categorical exercise of discretion was permissible did not last long. With the passage of the Second Chance Act,<sup>156</sup> the 2005 Rule became moot, causing the Bureau of Prisons to adopt a new rule.<sup>157</sup> This new rule also limited halfway house placement to six months but included a new exception intended to allow for longer placement. In short order, this rule was also challenged repeatedly.

### C. Post-Second Chance Act Placement Policy

The Bureau of Prisons promulgated a new rule following the passage of the Second Chance Act. Pursuant to the Second Chance Act's amendment of § 3624(c), an eligible inmate can be placed in a halfway house following an individualized assessment and for a period of time not to exceed twelve months.<sup>158</sup> The Bureau of Prisons was required to promulgate this new rule because Congress expanded the length of time that an inmate could be placed in a halfway house to twelve months, and removed the ten percent six-month time limit.<sup>159</sup> In providing guidance to its personnel, the Bureau of Prisons interpreted the changes under the Second Chance Act to permit capping an inmate's placement in a halfway house to a maximum of six months, unless an extraordinary justification existed and the Regional Director gave prior written approval (hereinafter the extraordinary justification exception rule).<sup>160</sup> Congress also made a point of clarifying the relationship between the Bureau of Prisons' various governing statutes.<sup>161</sup>

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155. *Id.*

156. Second Chance Act of 2007, Pub. L. No. 110-119, 122 Stat. 657 (2008) (codified in scattered sections of 18 and 42 U.S.C.).

157. Community Confinement, 70 Fed. Reg. 1659 (Jan. 10, 2005) (codified as 28 C.F.R. pt. 570) (2008) ("The Bureau published proposed rules on this subject on August 18, 2004 (69 FR 51213). In the proposed rule document, we explained that these rules would, as a matter of policy, limit the amount of time that inmates may spend in community confinement (including Community Corrections Centers (CCCs) and home confinement) to the last ten percent of the prison sentence being served, not to exceed six months."); *see also* Conley & Kenney Memo, *supra* note 14, § III(D) (instructing Bureau of Prisons personnel on the new policy and how to apply it).

158. 18 U.S.C. § 3624(c) (2010).

159. 18 U.S.C. § 3624(c)(1) (2010). In addition, Congress separates out the provision that relates to home confinement. *Id.* § 3624(c)(2).

160. Conley & Kenney Memo, *supra* note 14.

161. 18 U.S.C. § 3624(c)(6) (2010).

### 1. The Extraordinary Justification Exception Rule

In a memorandum to its personnel, the Bureau of Prisons presented the agency's new halfway house placement policy that it had promulgated pursuant to the Second Chance Act.<sup>162</sup> Under the new policy, the maximum amount of time available for an inmate to be placed in a halfway house doubled from six to twelve months;<sup>163</sup> the individualized determinations and consideration of the five factors were still required;<sup>164</sup> judicial requests for direct placements were not binding;<sup>165</sup> and the "categorical timeframe limitations" in the 2005 Rule were no longer valid.<sup>166</sup> The Bureau of Prisons explained that, if an inmate were eligible for a twelve-month placement, the agency's experience demonstrated that a maximum of six months was sufficient to prepare an inmate to reenter society successfully.<sup>167</sup>

The extraordinary justification exception rule was then submitted for notice and comment.<sup>168</sup> Similar to the 2005 Rule, the feedback did not support the Bureau of Prisons' position.<sup>169</sup> Various stakeholders emphasized that the six-month limitation would serve as a barrier to

162. Conley & Kenney Memo, *supra* note 14. See *Sacora v. Thomas*, 628 F.3d 1059, 1069 (9th Cir. 2010) (concluding that the Conley & Kenney Memo was an interpretive rule and not subject to notice and comment requirements under the APA. "Under the APA, a federal administrative agency is required to follow prescribed notice-and-comment procedures before promulgating substantive rules. However, these notice and comment requirements are not applicable to 'interpretive rules, general statements of policy, or rules of agency organization, procedure, or practice.'" (citations omitted).

163. Conley & Kenney Memo, *supra* note 14, § I(A) at 2.

164. *Id.* § I(B), at 2.

165. *Id.* § I(C), at 2.

166. *Id.* § I(B), at 2. The Bureau of Prisons also informed its personnel that the process of evaluating inmates for placement would begin seventeen to nineteen months before their release date rather than eleven to thirteen months. *Id.* § III(B), at 3.

167. *Id.* § III (D) at 4 ("While the [Second Chance] Act makes inmates eligible for a maximum of 12 months pre-release Residential Reentry Center placements, Bureau experience reflects inmates' pre-release Residential Reentry Center needs can usually be accommodated by a placement of six months or less.").

168. Pre-Release Community Confinement, 73 Fed. Reg. 62440 (Oct. 21, 2008) (codified at 28 C.F.R. § 570.20-.22 (2008)). The Bureau of Prisons promulgated the new rule as an Interim Final Rule because it had exceeded the ninety day period within which Congress had requested that a rule be created to reflect the changes made by the Second Chance Act.

169. S. David Mitchell, *Impeding Reentry: Agency and Judicial Obstacles to Longer Halfway House Placements*, SOC. SCI. RESEARCH NETWORK, n.10 (Aug. 23, 2010) (Univ. of Mo. Sch. Of Law Legal Studies, Research Paper No. 2010-20), [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1663804](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1663804). All of the comments submitted can be found at <http://www.regulations.gov/#!docketDetail%3Bdct=FR+PR+N+O+SR+PS%3Bbrpp=10%3Bso=DESC%3Bsb=postedDate%3Bpo=0%3BD=BOP-2009-0005>.

successful reentry,<sup>170</sup> and urged the Bureau of Prisons to reconsider the rule. Those with firsthand knowledge of the impact of placing an inmate in a halfway house, inmates<sup>171</sup> and their families,<sup>172</sup> all pled with the Bureau of Prisons to amend its rule. Organizations that play an integral role in providing reentry assistance to inmates also urged the Bureau of Prisons to drop the six-month limitation.<sup>173</sup> The Bureau of Prisons did not acquiesce.

Inmates challenged the Bureau of Prisons' position on the following grounds: the Second Chance Act required placement in a halfway house for the maximum period of twelve months;<sup>174</sup> the extraordinary justification exception rule was an impermissible exercise of discretion; and the Bureau of Prisons exceeded its statutory authority. The challenges have only achieved partial success.<sup>175</sup> To date, the appellate courts

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170. *Id.* at n.178. ("During the comment period, there were one hundred and forty-seven comments entered regarding the Bureau of Prisons' decision to change its halfway house placement policy").

171. *Id.* at n.175. ("Public comments submitted by inmates request that the Bureau of Prisons not restrict Residential Reentry Center placement to six months absent an extraordinary justification.").

172. *Id.* at n.176. ("Public comments submitted by individuals requested that the Bureau of Prisons not restrict Residential Reentry Center placement to six months absent an extraordinary justification.").

173. *Id.* at n.177. (The American Bar Association stated that "[t]he interim rule states in general terms that BOP will comply with the requirements of the Second Chance Act with respect to pre-release community confinement. However, it does not adopt a presumption in favor of a full 12 months' pre-release community placement, as we believe Congress intended in enacting the Second Chance Act, or otherwise specify the circumstances under which a prisoner will spend a full 12 months in a community placement." The Federal Public Defender of the Western District of Washington explained, that "[T]he Bureau continues to apply a presumption against optimizing the use of community confinement . . . [T]he Bureau should adopt a presumption in favor of twelve months' pre-release placement in halfway house absent identifiable circumstances indicating that a lesser period will be sufficient . . ." The American Legislative Exchange Council (ALEC) noted that "Although the interim rule for community confinement appears to satisfy statutory requirements on its face, ALEC believes that the interim rule should be rewritten and bolstered to ensure that halfway house placement be more readily available for the full twelve months contemplated in the law, rather than six months". Other groups that voiced their disagreement included the Families Against Mandatory Minimums, Prison Fellowship, Justice & Mercy, Inc., and the Mentor Corps.").

174. *Daraio v. Lappin*, No. 3:08CV1812(MRK), 2009 WL 303995, at \*4 (D. Conn. Feb. 9, 2009) ("[Daraio] contends that the BOP rarely, if ever, grants pre-release community confinement in excess of 180 days, although specifically authorized to do so under the express terms of the Second Chance Act."); *Stanko v. Rios*, No. 08-4991(JNE/JJG), 2009 WL 1303969, at \*1 (D. Minn. May 8, 2009) ("Mr. Stanko . . . asserts that, under provisions of the recently passed Second Chance Act, he is entitled to home detention and to early placement at a halfway house.").

175. See, e.g., *Strong v. Schultz*, 599 F. Supp. 2d 556 (D.N.J. 2009); *Carmichael v. Holinka*, No. 09-cv-388-slc., 2009 WL 2512029 (W.D. Wis. Aug. 17, 2009) (ordering the Bureau of Prisons to transfer the petitioner to a halfway house or re-evaluate the

have tended to agree with the Bureau of Prisons or found the petitions moot.<sup>176</sup>

## 2. Challenges to the Extraordinary Justification Exception Rule

Inmate challenges to the extraordinary justification exception rule have achieved mixed success.

### *a. Successful Inmate Challenges*

Douglas Strong was convicted of bringing undocumented immigrants into the United States and was sentenced to thirty-three months imprisonment.<sup>177</sup> After reviewing his case, the Bureau of Prisons indicated that Strong was eligible to serve a maximum of sixty days in a halfway house.<sup>178</sup> He challenged the placement on the grounds that it was contrary to §§ 3621(b) and 3624(c) as amended by the Second Chance Act,<sup>179</sup> and that he was entitled to a full twelve months in a halfway house.

Strong asserted that he should receive this length of placement because he was non-violent, had serious medical conditions, and had extensive substance abuse treatment needs.<sup>180</sup> He argued that the six-month placement designation, as expressed in the Bureau of Prisons' internal memorandum,<sup>181</sup> "contradict[ed] Congress's directive that CCC placement time be of sufficient duration to provide the greatest likelihood of successful reintegration into the community."<sup>182</sup> He further argued that the determination of his placement "deprive[ed] [him] of the statutory opportunity to be individually considered for CCC placement for a period of up to one year on the basis of the neutral criteria identified by Congress in 18 U.S.C. § 3621(b)."<sup>183</sup>

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placement designation using the five factors in § 3621(b)); *Krueger v. Martinez*, 665 F. Supp. 2d 477 (M.D. Pa. 2009).

176. See *Sacora v. Thomas*, 628 F.3d 1059, 1066 (9th Cir. 2010) ("In delegating the authority to the BOP to adopt regulations implementing the SCA [Second Chance Act], the space between 'sufficient duration' and '12 months' was expressly left to the BOP to fill. The BOP's policy—that six months in a RRC constitutes a 'sufficient duration' in most cases, but that each inmate is eligible for a 12-month placement and must be considered for placement in a RRC on an individual basis—is facially consistent with the statute."). See also *Lovett v. Hogsten*, No. 09-5605, 2009 WL 5851205 (6th Cir. Dec. 29, 2009); *Ciocchetti v. Wiley*, 358 F.App'x 20, 24 (10th Cir. 2009).

177. *Schultz*, 599 F. Supp. 2d at 557.

178. *Id.* at 558.

179. *Id.*

180. *Id.*

181. Conley & Kenney Memo, *supra* note 14.

182. *Schultz*, 599 F. Supp. 2d at 560.

183. *Id.*

In regard to the extraordinary justification exception rule, petitioner Strong stated, “Instead of striving to implement the intent of Congress ‘to provide the greatest likelihood of successful reintegration into the community,’ the BOP, in a bit of institutional arrogance, announced that, notwithstanding the will of Congress, the presumptive norm would continue to be a maximum of six months RRC placement.”<sup>184</sup> The Bureau of Prisons responded that its policy adequately reflected the changes that the Second Chance Act required.<sup>185</sup>

Following an amended judgment of conviction, the Bureau of Prisons increased the length of Strong’s placement.<sup>186</sup> The agency stated that half a year was enough time for Strong to successfully reintegrate into society.<sup>187</sup> The Bureau of Prisons contended that the revised placement had been “determined pursuant to the Second Chance Act,”<sup>188</sup> and that the petition should therefore be dismissed on the merits.<sup>189</sup>

The district court disagreed, holding that the Bureau of Prisons should reconsider Strong for placement in a halfway house for the duration of his sentence.<sup>190</sup> Due to the time remaining on his sentence, it would only have been for a maximum of nine months.<sup>191</sup> The court’s reasoning was based upon a *Chevron* analysis of §§ 3621(b) and 3624(c).

According to the court, Congress limited the Bureau of Prisons’ discretion to determine the duration of an inmate’s placement in a halfway

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184. *Id.*

185. *Id.* at 559.

186. *Id.* at 558 (“[O]n August 20, 2008, United States District Judge Dana M. Sabraw amended Petitioner’s judgment of conviction to provide for two years of supervised release and to delete the supervised release condition requiring Petitioner to reside in a CCC for 120 days . . . . Petitioner’s Unit Team reconsidered Petitioner’s CCC placement date in light of this development. On October 2, 2008, Warden Schultz signed a second Institutional Referral for CCC Placement, which provides for a six-month placement.”).

187. *Id.* at 558–59 (“The Referral form states that . . . ‘[i]nmate Strong is being referred for Residential Reentry Center placement for a period of 180 days, pursuant to the Second Chance Act. The Unit Team has determined the recommended placement is of sufficient duration to provide the greatest likelihood of successful reintegration into the community. He will be able to use this time to establish employment and enhance family ties.’”).

188. Conley & Kenney Memo, *supra* note 14.

189. *Schultz*, 599 F. Supp. 2d at 559. The Bureau of Prisons also argued that Strong failed to exhaust his administrative remedies after the second referral. *Id.* at 560–61. The court, rightfully so, dismissed that claim on the grounds that it would not have been expedient for Strong to submit to a second appeal process given the five months it took to complete the first appeal. *Id.* (“Given that it took five months to exhaust administrative remedies the first time around, dismissal of the Petition as unexhausted would effectively moot Petitioner’s § 2241 claim through no fault of his own. . . . [T]he purposes of exhaustion would not be served by requiring a second round of exhaustion, since Strong is challenging the validity of the BOP’s April 14, 2008, guidance, not its application. This Court will therefore excuse the failure to exhaust administrative remedies.”).

190. *Id.* at 563.

191. *Id.* at 563 n.4.



house with the language that “each placement is [to be] ‘of sufficient duration [not to exceed 12 months] to provide the greatest likelihood of successful reintegration into the community.’”<sup>192</sup> The court explained that with the increase in the period of time in conjunction with the “sufficient duration” requirement, “Congress intended that each inmate . . . be considered for a placement of the longest duration—12 months . . .”<sup>193</sup> The court based its holding on the premise that Congress amended §§ 3621(b) and 3624(c) in an effort to provide inmates with the best opportunity to reenter society successfully. The court stated that, “[o]bviously, an underlying premise of these amendments is that the more time an inmate spends in a CCC before he or she is released from BOP custody, the more likely it is that his or her community reintegration will be successful.”<sup>194</sup> The court therefore concluded that Congress never intended that an inmate’s stay in a halfway house be restricted to six months. Not every court agreed with this conclusion.

### *b. Unsuccessful Inmate Challenges*

In *Miller v. Whitehead*, four inmates with varying amounts of time remaining on their sentences wanted to be transferred to a halfway house for more than six months.<sup>195</sup> However, each inmate was denied the transfer because he failed to establish an extraordinary justification for a placement in excess of six months.<sup>196</sup> The inmates contended that the extraordinary justification requirement was impermissible because it ignored the § 3621(b) factors, thus failing to provide each with an individualized assessment. Moreover, the inmates argued that the extraordinary justifica-

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192. *Id.* at 562.

193. *Id.* at 562. The court readily acknowledged that not every placement would be for the full twelve months, but that the Bureau of Prisons was required to conduct an individualized assessment. *Id.* (“[T]he ultimate placement may be less than 12 months, if warranted by application of the § 3621(b) factors, i.e., the nature and circumstances of the offense, the inmate’s history and pertinent characteristics, and any statement by the sentencing court.”).

194. *Id.*

195. *Miller v. Whitehead*, 527 F.3d 752, 755 (8th Cir. 2008) (“Inmate Gary Miller requested transfer to an RRC for the last 73 months of his ten-year sentence. Fernando Lovato requested transfer for the final 16 to 18 months of his ten-year sentence. Kenneth Howard initially requested transfer for the last 8 to 10 months of his nine-year sentence, and later, with 20 months remaining in his sentence, Howard requested immediate placement in a Residential Reentry Center. David Lauer, Sr., requested transfer for the final 30 months of his 70-month sentence.”).

196. *Id.* (“The Bureau of Prisons rejected the various requests. The warden advised Miller, Lovato, and Lauer that each had not established an ‘extraordinary justification’ for serving more than 180 days in an RRC.”).

tion requirement was an additional factor that Congress did not obligate the Bureau of Prisons to consider.<sup>197</sup>

The Eighth Circuit, which previously found the categorical exercise of agency discretion to be impermissible, agreed with the lower court that the Bureau of Prisons was authorized to require an extraordinary justification for a longer halfway house placement.<sup>198</sup> Citing *Lopez*, the Eighth Circuit explained that the Bureau of Prisons, as the decision maker, had the authority to engage in this type of rulemaking “to resolve certain issues of general applicability unless Congress clearly expresses an intent to withhold that authority.”<sup>199</sup> The extraordinary justification requirement was a permissible exercise of agency discretion because it resolved a statutory ambiguity of applicability.

The Eighth Circuit stated that the extraordinary justification requirement was not a non-statutory factor that was being improperly considered, but was instead a standard for deciding whether an inmate should be placed in a halfway house for more than six months.<sup>200</sup> The court found that while “ordinarily a placement of more than [six months] is not appropriate under [section] 3621(b) . . . a particular inmate still has the opportunity to show that in the individual circumstance of his case, a longer placement would be justified.”<sup>201</sup> Hence, the reasoning of the court was that the mere existence of the opportunity to receive a placement longer than six months made the extraordinary justification exception rule different from the categorical exercise of discretion rule. Other courts also agreed with the Eighth Circuit, paying particular attention to the extraordinary justification requirement and reemphasizing that it was a proper exercise of discretion.<sup>202</sup>

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197. *Id.* at 757.

198. *Id.* at 756. The extraordinary justification for placement in excess of six months has been a part of the Bureau of Prisons’ practice and policy dating back to the 1998 Program Statement. FED. BUREAU OF PRISONS, PROGRAM STATEMENT 7310.04, *supra* note 15. According to the program statement, “[a]n inmate may be referred up to 180 days, with placement beyond 180 days highly unusual, and only possible with extraordinary justification. In such circumstances, the Warden shall contact the Regional Director for approval and the Chief USPO in the inmate’s sentencing district to determine whether the sentencing judge objects to such placement.” *Id.* at 8. The extraordinary justification rule was not considered a violation because 18 U.S.C. § 3624(c) had the ten percent or six-month timeframe limitations.

199. *Miller*, 527 F.3d at 757.

200. *Id.*

201. *Id.* at 758.

202. See *Johnson v. Hogsten*, No. 6:09-82, 2009 WL 1010627 (E.D. Ky. Apr. 15, 2009); *Reichenbach v. Outlaw*, No. 4:08CV004186, 2009 WL 799021 (E.D. Ark. Mar. 24, 2009); *Somerville v. Dewalt*, No. 5:09-CV-68-KKC, 2009 WL 1211158 (E.D. Ky. May 1, 2009); *Snyder v. Angelini*, No. 07-3073, 2008 WL 4773142, at \*3 (E.D.N.Y. Oct. 27, 2008) (“The Bureau of Prisons’ policy still requires the Bureau of Prisons to consider all of the factors set forth in Section 3621(b), and merely superimposes upon that consideration a temporal standard which enables the Bureau of Prisons to prioritize inmate requests for

The extraordinary justification exception rule firmly capped the length of time that an inmate could be placed in a halfway house, a prospect that Congress did not intend when it passed the Second Chance Act and amended §§ 3621(b) and 3624(c). All inmates are treated alike under the rule, which presumes that six months is a satisfactory length of time to spend in a halfway house. The blanket treatment of all inmates ignores Congress' intent that each inmate's placement be individualized in order to maximize that inmate's chances at successful reentry.

Additionally, the extraordinary justification exception rule was qualitatively no different than the 2005 Rule. The Bureau of Prisons created a standardized length of placement of six months that was no different from its previous categorical exercise of discretion, which several courts found to be impermissible. The extraordinary justification exception rule allows the Bureau of Prisons to limit the placement of all inmates, as a group, without having to conduct an individualized assessment of each inmate before doing so. Both rules thus undermined Congress' intent to have the Bureau of Prisons conduct an individualized assessment of each inmate pursuant to § 3621(b).

The Bureau of Prisons' extraordinary justification exception rule is an impermissible exercise of agency discretion because it disregards the statutory mandates to conduct an individualized assessment of each inmate and to assure that each inmate has a reasonable opportunity to reenter society successfully. The rule fails to give effect to Congress' intent in amending the statutes when it passed the Second Chance Act.

## II. REVIEWING THE BUREAU OF PRISONS' PLACEMENT POLICY

Under either *Chevron* or hard look review,<sup>203</sup> the Bureau of Prisons engaged in an impermissible exercise of discretion that was not entitled to judicial deference.

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transfer to community confinement.”); *Yaeger v. Whitehead*, No. 08-4020, 2008 WL 2330221 (D. S.D. June 3, 2008) (finding that the extraordinary justification rule is not being improperly considered as a non-statutory factor); *Bunn v. Angelini*, No. 07-891, 2008 WL 648450 (M.D. Pa. Mar. 5, 2008); *Fariduddin v. Morrison*, No. 06-2866, 2007 WL 107678, at \*1 (D. Minn. Jan. 10, 2007) (“Moreover, requiring ‘extraordinary justification’ to extend CCC placement beyond six months does not violate § 3621(b) because it does not preclude the completion of an individualized assessment.”).

203. *Food & Drug Admin. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000). *But see* *Sacora v. Thomas*, 628 F.3d 1059, 1066 (9th Cir. 2010) (stating that, “because Program Statement 7310.04 and the April 14 Memorandum ‘do [] not purport to carry the force of law and [were] not adopted after notice and comment,’ they are not entitled to the level of deference provided for in *Chevron*.”). However, the Interim Final Rule, “Pre-Release Community Confinement” (73 C.F.R. § 62440-01 (2008)), that the Bureau of Prisons promulgated was submitted for notice and comment.

A. *Chevron* Analysis

Under *Chevron*,<sup>204</sup> the court uses a two-step test to determine whether an agency's statutory construction is entitled to deference.<sup>205</sup> A reviewing court in step one of *Chevron* analyzes the statutory language to determine whether Congress spoke clearly to the precise issue in question.<sup>206</sup> If Congress clearly resolved the issue, the courts and the agency are required to abide by the statutory language.<sup>207</sup> If, however, the court finds that the statute is ambiguous, it proceeds to the second step of *Chevron*.<sup>208</sup> In step two, a reviewing court evaluates whether the agency's statutory interpretation was reasonable.<sup>209</sup> If the court determines that it was reasonable, then the court must defer to the agency's interpretation.<sup>210</sup> In assessing whether the agency's interpretation is proper, some courts have been quite deferential,<sup>211</sup> while others have applied a more rigorous scrutiny, known as a hard look review.<sup>212</sup>

## 1. Step One—Did Congress Speak to the Precise Issue?

In step one of the *Chevron* analysis, the reviewing court determines whether Congress spoke to the precise issue. The court, in making this determination, will use "traditional tools of statutory construction,"<sup>213</sup> such as an examination of the statutory text, dictionary definitions,<sup>214</sup>

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204. *Chevron U.S.A. Inc. v. Natural Res. Def. Council*, 467 U.S. 837 (1984).

205. *Id.* at 842–43.

206. *Id.* at 842.

207. *Id.* at 843; *United States v. Haggar Apparel, Co.*, 526 U.S. 380, 392 (1999); *Holly Farms Corp. v. NLRB*, 517 U.S. 392, 398 (1996).

208. *Chevron*, 467 U.S. at 843.

209. *Id.* at 843–44.

210. *Id.* *INS v. Aguirre-Aguirre*, 526 U.S. 415, 421 (1999); *Auer v. Robbins*, 519 U.S. 452, 457 (1997). Courts rarely find an agency's actions unreasonable under the traditional assessment, which mirrors the standards under the arbitrary and capricious test. With the contemporary approach, courts have engaged in a more rigorous assessment of the agency's actions, a "hard look" approach to determine whether the agency's interpretation comports with the intent of Congress.

211. See *AT&T Corp. v. Iowa Utilities Bd.*, 525 U.S. 366 (1998).

212. See *Motor Vehicle Mfrs. Ass'n of the U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29 (1983). A number of lower courts also employ this approach. *Arent v. Shalala*, 70 F.3d 610, 614 (D.C. Cir. 1995); *Indep. Petroleum Ass'n of America v. Babbitt*, 92 F.3d 1248, 1258 (D.C. Cir. 1996); *Animal Legal Def. Fund, Inc. v. Glickman*, 204 F.3d 229, 235 (D.C. Cir. 2000); *Tex. Office of Pub. Util. Counsel v. FCC*, 183 F.3d 393, 410 (5th Cir. 1999) (noting that the two kinds of review are distinct).

213. *NLRB v. Food & Commercial Workers*, 484 U.S. 112, 123 (1987). See generally A GUIDE TO JUDICIAL AND POLITICAL REVIEW OF FEDERAL AGENCIES 58–82, §§ 3.0221–2.0225 (John F. Duffy & Michael Herz, eds., American Bar Association 2005).

214. *Smiley v. Citibank*, 517 U.S. 735, 746 (1996); *Babbitt v. Sweet Home Chapter of Cmty. for a Great Or.*, 515 U.S. 687, 697–708 (1995).

canons of construction, statutory structure, legislative purpose,<sup>215</sup> and legislative history.<sup>216</sup> Under this approach, a court focuses on the statutory language,<sup>217</sup> looking at individual words, sentence structure, and other rules of syntax.<sup>218</sup> But these are not the only sources that courts use to determine whether Congress spoke directly to the issue.

In reviewing a statute, courts also review the statutory context.<sup>219</sup> Courts will look at other acts that may affect the statute, including those that were passed contemporaneously with or subsequent to the statute under review.<sup>220</sup> Moreover, the reviewing court is also guided by common sense. When determining whether Congress spoke to the precise issue, a court will look at whether "Congress is likely to delegate a policy decision of such economic and political magnitude to an administrative agency."<sup>221</sup> This approach of reviewing the statutory language and context can best be summed up as taking a "gestalt approach" to determine whether Congress was clear and unambiguous in expressing its intent.<sup>222</sup>

Using a gestalt approach, it is evident that Congress clearly and unambiguously required Congress to consider the five factors and conduct an individualized assessment of each inmate. Consequently, a reviewing court should conclude that the Bureau of Prisons' extraordinary justifica-

215. *AT&T Corp.*, 525 U.S. at 412 (Breyer, J., concurring in part and dissenting in part); *Presley v. Etowah Cnty. Comm'n*, 502 U.S. 591, 508–09 (1992); *Your Home Visiting Nurse Serv., Inc. v. Shalala*, 525 U.S. 449, 452–57 (1998) (reviewing the statutory purpose of a provision and its consistency with other provisions in the statute); *Rust v. Sullivan*, 500 U.S. 173, 184–85, 188–90 (1991).

216. See A GUIDE TO JUDICIAL AND POLITICAL REVIEW OF FEDERAL AGENCIES, *supra* note 213, at 57. *But see* *Green v. Bock Laundry Mach. Co.*, 490 U.S. 504, 527–29 (1989) (Scalia, J. concurring) (refusing to consider legislative history).

217. *Schreiber v. Burlington N., Inc.*, 472 U.S. 1, 5 (1985); *Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432, 438 (1999).

218. *Brown v. Gardner*, 513 U.S. 115, 118 (1994).

219. *Davis v. Mich. Dep't. of Treasury*, 489 U.S. 803, 809 (1989); *Food & Drug Admin. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132 (2000) ("[Reviewing] court should not confine itself to examining a particular statutory provision in isolation."); *Gardner*, 513 U.S. at 118.

220. *United States v. Estate of Romani*, 523 U.S. 517, 530–31 (1998); *United States v. Fausto*, 484 U.S. 439, 453 (1988).

221. *Brown & Williamson Tobacco*, 529 U.S. at 133. *But cf.* *MCI Telecomm. Corp. v. American Tel. & Tel. Co.*, 512 U.S. 218, 231 (1994).

222. Alan K. Chen, *Shadow Law: Reasonable Unreasonableness, Habeas Theory, and the Nature of Legal Rules*, 2 BUFF. CRIM. L. REV. 535, 555 n.49 (1999); F. Philip Manns, Jr., *Internal Revenue Code Section 162(f): When Does the Payment of Damages to a Government Punish the Payor?*, 13 VA. TAX REV. 271, 295 (1993) ("The sources of legislative intent relied upon by each court did not declare that the penalty at issue was intended to punish. Some decisions attached talismanic significance to the presence of the word 'penalty' in legislative history or in court decisions construing the provision at issue without further inquiry into whether there was a punitive intent behind the penalty. Others took a gestalt approach to the legislative history and found an expression of punitive intent even though such intent could not be derived from a summation of a statute's parts.").

tion exception rule is not in accord with its statutory mandates, and thus exceeds its statutory grant of discretion.

*a. The Statutory Language of 18 U.S.C. § 3621(b)*

Under § 3621(b), Congress mandated the Bureau of Prisons to act and permitted it to exercise discretion.

The Bureau of Prisons shall designate the place of the prisoner's imprisonment. The Bureau may designate any available penal or correctional facility that meets minimum standards of health and habitability established by the Bureau, whether maintained by the Federal Government or otherwise and whether within or without the judicial district in which the person was convicted, that the Bureau determines to be appropriate and suitable, considering—(1) the resources of the facility contemplated; (2) the nature and circumstances of the offense; (3) the history and characteristics of the prisoner; (4) any statement by the court that imposed the sentence . . . and (5) any pertinent policy statement issued by the Sentencing Commission . . . .<sup>223</sup>

In the first sentence, Congress' use of the word "shall" indicates that the Bureau of Prisons is required to perform this duty.<sup>224</sup> In the second sentence, the use of the word "may" indicates that the Bureau of Prisons has the discretion to determine the facility in which the inmate is placed. This discretion, however, is qualified<sup>225</sup> by the requirement that the Bureau of Prisons "consider" five factors.<sup>226</sup> Courts, reviewing the statute in response to earlier policy changes, have disagreed about whether the five statutory factors limit the Bureau of Prisons' discretion.<sup>227</sup> The majority of courts

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223. 18 U.S.C. § 3621(b) (2010).

224. *Id.*; *Levine v. Apker*, 455 F.3d 71, 80 (2d Cir. 2007) ("The statute . . . employs the word 'shall,' and thus obliges the BOP to 'designate the place of the prisoner's imprisonment.'").

225. 18 U.S.C. § 3621(b) (2010); *Levine*, 455 F.3d at 80 ("Congress's use of the language 'may designate' in this provision seemingly endows the BOP with 'broad discretion.' . . . [T]he fact that the statute differentiates between the use of 'may' and 'shall' in adjacent sentences indicates the drafters' mindfulness of the significance of those terms.").

226. 18 U.S.C. § 3621(b) (2010); *Muniz v. Sabol*, 517 F.3d 29, 35 (1st Cir. 2008) ("The plain language of [section 3621(b)] contains a grant of discretion and a command that the BOP consider the five factors when exercising that discretion.").

227. *Goldings v. Winn*, 383 F.3d 17, 33 (1st Cir. 2004) (Howard, J. concurring) ("In making assignments and transfers, Congress suggested that BOP consider several factors including the resources of the facility, the nature and circumstances of the offense, the history and characteristics of the prisoner, any recommendations by the sentencing court, and pertinent policy statements from the Sentencing Commission. These factors are non-exclusive and do not bind or limit BOP's exercise of its discretion.").

that have reviewed § 3621(b) have determined that the Bureau of Prisons is required to assess an inmate's placement according to these factors.<sup>228</sup> The position of this Article is that their assessment is the correct one.

By using the word “considering,” which means “taking into account,”<sup>229</sup> Congress indicated its intent. Congress wanted the Bureau of Prisons to take the factors into account when determining an inmate's place of imprisonment. Apart from the definitions of the words, the sentence structure also indicates that Congress intended the Bureau of Prisons to use the factors. Congress' intent in this regard is plainly evident when the second sentence is read without the subordinate clauses. “The Bureau may designate any available penal or correctional facility that meets minimum standards of health and habitability established by the Bureau . . . considering . . .”<sup>230</sup> It is readily apparent that Congress intended the designation of an inmate to “any available penal or correctional facility,” including a halfway house,<sup>231</sup> to be made after the Bureau of Prisons considered the five factors.

An alternative reading that may be proffered by the Bureau of Prisons is that the word “considering” and the five factors modify the preceding subordinate clause. That reading, however, is incorrect. Those inclined to find that the Bureau of Prisons' discretion is unfettered are likely to raise the argument that Congress inserted the word “considering” and the five factors to modify the phrase “that the Bureau determines to be appropriate and suitable.”<sup>232</sup> This phrase, however, modifies the phrase “whether maintained by the Federal Government or otherwise and whether within or without the judicial district in which

228. *Rodriguez v. Smith*, 541 F.3d 1180, 1186 (9th Cir. 2008); *Wedelstedt v. Wiley*, 477 F.3d 1160, 1166 (10th Cir. 2007); *Levine*, 455 F.3d at 82; *Woodall v. Fed. Bureau of Prisons*, 432 F.3d 235, 245 (3d Cir. 2005); *Fults v. Sanders*, 442 F.3d 1088, 1092 (8th Cir. 2006). *But see Muniz*, 517 F.3d at 35.

229. *Considering*, MERRIAM-WEBSTER DICTIONARY, <http://www.merriam-webster.com/dictionary/considering>. See Ellen P. Aprill, *The Law of the Word: Dictionary Shopping in the Supreme Court*, ARIZ. ST. L.J. 275 (1980) (discussing the issue of dictionary shopping); Note, *Looking It Up: Dictionaries and Statutory Interpretation*, 107 HARV. L. REV. 1437 (1994). In deciding whether the Bureau of Prisons is required to apply the five factors, the analysis has focused on specific language. Yet, it has been argued that jurists search for a definition that suits their own ends.

230. 18 U.S.C. § 3621(b) (2010).

231. The issue as to whether a halfway house constituted a penal or correctional facility was contested earlier by the Office of Legal Counsel. It was decided that a halfway house was a place of imprisonment. Statutory Authority to Contract with the Private Sector to Secure Facilities, 16 Op. O.L.C. 65, 1992 WL 479543 (Mar. 25, 1992). *But see Goldings*, 383 F.3d at 25 (The defendants “argue that a CCC is not a ‘place . . . of imprisonment’ as required by the first sentence of § 3621(b) . . .”). In subsequent appeals, however, the Bureau of Prisons dropped this argument. *Rodriguez*, 541 F.3d at 1185 n.5 (“[T]he BOP itself has acknowledged that § 3261(b) [sic] grants it the authority to ‘place offenders sentenced to a term of imprisonment in [RRCs].’”).

232. 18 U.S.C. § 3621(b) (2010).

the person was convicted.”<sup>233</sup> Congress sought to ensure that the facility that was selected to place an inmate was “appropriate and suitable.”<sup>234</sup> The five factors modified the discretion on the designation of placement, thus qualifying the Bureau of Prisons’ discretion.

A review of the plain text of the language and the sentence structure is definitive evidence that Congress intended that the designation of an inmate’s place of imprisonment be an individualized assessment conducted in accord with the five factors, particularly since factors two and three relate specifically to the individual inmate.<sup>235</sup> Although the core of § 3621(b) has remained relatively unchanged since its adoption,<sup>236</sup> Congress did amend it in the Second Chance Act, addressing direct judicial placements.<sup>237</sup>

Congress amended § 3621(b) by adding the following sentence at the end of the paragraph after the fifth factor: “Any order, recommendation, or request by a sentencing court that a convicted person serve a term of imprisonment in a community corrections facility shall have no binding effect on the authority of the Bureau under this section to determine or change the place of imprisonment of that person.”<sup>238</sup> The sentence clarified the issue of direct judicial placement, proclaiming that no “order, recommendation, or request by a sentencing court” was binding. Reviewing this sentence in light of the 2002 Rule, it appears as if Congress approved of the Bureau of Prisons’ exercise of discretion to cease accepting direct judicial placement recommendations. That, however, was not the case. The statement merely codified the agency’s longstanding practice with regard to direct judicial placements. While the Bureau of Prisons complied with eighty percent of the judicial recommendations, these placement requests were not granted automatically and were not binding on the agency.<sup>239</sup> In the same way that the existing policy of direct judicial placements was reaffirmed, Congress was explicit about the application of the five factors in § 3621(b).

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233. *Id.*

234. *Id.*

235. 18 U.S.C. § 3621(b)(2)–(3) (2010). *See, e.g.*, *Bowers v. Warden, Fed. Prison Camp, Yankton*, No. Civ. 10-4066, 2011 WL 795546, at \*7 (D.S.D. Feb. 25, 2011) (stating that pursuant to § 3621(b) the unit team recommended a placement of 120–150 days); *McDowell v. Scism*, No. 10-2817, 2011 WL 184013, at \*2–\*3 (M.D. Pa. Jan. 20, 2011) (stating that the unit team initially recommended a placement of 150–180 days in an RRC, then reduced it to 90–120 days and then increased it once more to 121–150 days); *Graves v. Babcock*, No. 3:10cv375/WS/MD, 2011 WL 818447, at \*4 (N.D. Fla. Jan. 20, 2011) (stating that the unit team recommended a placement of 180 days).

236. 18 U.S.C. § 3621 (1984).

237. Second Chance Act of 2007, Pub. L. No. 110-199, 122 Stat. 657 (2008) (codified in scattered sections of 18 and 42 U.S.C.).

238. 18 U.S.C. § 3621(b) (2010).

239. *Borges*, *supra* note 31, at 189.



The plain language of § 3621(b) indicates that the Bureau of Prisons was required to engage in an individualized assessment when determining an inmate's place of imprisonment.<sup>240</sup> The extraordinary justification exception rule is an *a priori* determination that created a blanket policy that disregards § 3621(b)'s statutory mandate to conduct an individualized assessment. Specifically, the new rule ignores two of the five factors—"nature and circumstances of the offense" and "history and characteristics of the prisoner"—that relate specifically to determining the proper placement for each inmate.<sup>241</sup> It has been argued that, even if the agency failed to consider the five factors in initially designating an inmate's place of imprisonment, the extraordinary justification exception sufficiently satisfies the requirements of § 3621(b). That exception does not, however, salvage the rule.

Substantively, the extraordinary justification exception allows an inmate to receive a placement in excess of six months. The problem with the exception is the timing of when it is considered. The statutory language of § 3621(b) is clear. Congress required the Bureau of Prisons to take the five factors into account *prior* to making its placement decision.<sup>242</sup> Congress did not intend for the Bureau of Prisons to conduct a post hoc assessment of evidence provided by an inmate in his effort to secure a longer placement. The extraordinary justification exception rule operates simply as a categorical exercise of discretion by a different name, and remains a statutory violation. The Bureau of Prisons may offer similar arguments that it raised in response to the challenges to the 2005 Rule, relying once again on *Lopez*.<sup>243</sup> The same arguments that the court relied upon to find *Lopez* inapplicable and distinguishable when evaluating the 2005 Rule are also applicable to the extraordinary justification exception rule.<sup>244</sup> Additionally, a court may conclude that the agency's interpretation was incorrect using canons of construction.<sup>245</sup>

A court, after applying a particular canon of construction, may conclude that the agency's interpretation is not entitled to deference, even

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240. *Muniz v. Sabol*, 517 F.3d 29, 35 (1st Cir. 2008) ("The plain language of [section 3621(b)] contains a grant of discretion and a command that the BOP consider the five factors when exercising that discretion. The BOP 'shall designate the place of the prisoner's imprisonment.' 18 U.S.C. § 3621(b). The BOP is provided the discretion to choose 'any available penal or correctional facility that meets minimum standards of health and habitability . . . that the Bureau determines to be appropriate and suitable, considering' the five factors.").

241. 18 U.S.C. §§ 3621(b)(2)–(3) (2010).

242. *See id.* § 3621(b); COMMITTEE REPORT ON SENTENCING REFORM ACT, *supra* note 36, at 142.

243. *Lopez v. Davis*, 531 U.S. 230 (2001).

244. *See supra* Part II.

245. Ronald Levin, *The Anatomy of Chevron: Step Two Reconsidered*, 72 CHI.-KENT L. REV. 1253, 1279 & n.115 (1997).

though the statutory language appears to be ambiguous.<sup>246</sup> The canons of statutory construction upon which the courts have often relied are the democratic process,<sup>247</sup> the protection of under-enforced constitutional norms,<sup>248</sup> and the protection of social policies, including regulatory norms.<sup>249</sup> Of these three, the most pertinent canon of construction is the social policy canon.<sup>250</sup> This canon of construction aims to protect “certain principles or groups,”<sup>251</sup> such as construing remedial statutes broadly or interpreting laws to favor Native Americans.<sup>252</sup> In regard to the Bureau of Prisons’ placement policy, the social policies that are being advocated and protected are twofold: reducing recidivism and increasing public safety.

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246. *Id.* at 1283–84 (“In other words, although the court finds the statutory language is ambiguous, it holds that a particular canon of construction rules out the agency’s interpretation because it is inconsistent with the statute as interpreted with the guidance [of] the canon.”).

247. The canons that are references with respect to the democratic process account for problems in the environment in which legislation is drafted. Bernard Bell, *Using Statutory Interpretation to Improve the Legislative Process: Can It Be Done in the Post-Chevron Era?*, 13 J.L. & POL. 105, 132 (1997) (stating that allowing agencies to exercise their discretion to apply or reject “interpretative methodologies” that are “designed to improve the legislative process may undermine their effectiveness.”); Jane Schacter, *Metademocracy: The Changing Structure of Legitimacy in Statutory Interpretation*, 108 HARV. L. REV. 593, 607–11 (1995).

248. See Lawrence Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 HARV. L. REV. 1212 (1978) (defining the concept of underenforced constitutional norms); *DeBartolo Corp., v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 578 (1988) (declining to defer to the NLRB when the statutory construction raised First Amendment concerns); *Qualcomm Inc. v. FCC*, 181 F.3d 1370, 1379 (D.C. Cir. 1999) (applying the canon of constitutional doubt to the agency interpretation which raised serious constitutional concerns).

249. *Mich. Citizens for an Indep. Press v. Thornburgh*, 868 F.2d 1285 (D.C. Cir. 1989), *aff’d*, 493 U.S. 38 (1989); *Pub. Citizen v. Young*, 831 F.2d 1108, 1113–18 (D.C. Cir. 1987). See also, CASS R. SUNSTEIN, *THE COST-BENEFIT STATE: THE FUTURE OF REGULATORY PROTECTION* 63–70 (2002) (favoring judicial deference to statutory interpretations by agencies that seek to avoid absurd results, such as exorbitant expenditures to address trivial risks).

250. The use of these canons at step one is not universally accepted. “[T]he proper use of these canons is often intertwined with the sort of policy decisions for which agencies are better suited than courts. Some courts therefore do not apply them at step one . . . On the other hand, if courts view these canons as relatively settled default rules that provide an interpretive scheme against which Congress legislates, they may feel comfortable using them at step one to ascertain congressional intent.” A GUIDE TO JUDICIAL AND POLITICAL REVIEW OF FEDERAL AGENCIES, *supra* note 213, § 3.02253. See e.g., *King v. St. Vincent’s Hosp.*, 502 U.S. 215, 220–21 & n.9 (1991) (noting a presumption that Congress’ legislation is enacted with these interpretive rules in mind).

251. A GUIDE TO JUDICIAL AND POLITICAL REVIEW OF FEDERAL AGENCIES, *supra* note 213, § 3.02253. *King*, 502 U.S. at 220–21 n.9 (1991) (noting a presumption that Congress’ legislation is enacted with these interpretive rules in mind).

252. *Ariz. Pub. Serv. Co. v. EPA*, 211 F.3d 1280, 1294 (D.C. Cir. 2000); *Ramah Navajo Chapter v. Lujan*, 112 F.3d 1455, 1462 (10th Cir. 1997).

The reentry movement, with the Second Chance Act as its signature piece of legislation, is focused on improving the reentry prospects of inmates following release from incarceration. Current data demonstrate that, within the first year after release, approximately one-third of inmates will re-offend, and within three years, approximately two-thirds will do so.<sup>253</sup> The new offenses will have new victims, thus endangering the public and decreasing public safety. In this context, non-correctional stakeholders have focused on post-release assistance programs that provide housing, education and job training, among other services.<sup>254</sup> Upon release, the Bureau of Prisons no longer has the authority to impact the lives of inmates. Hence, it must address reentry at the pre-release custodial stage. Because of the changing demographics<sup>255</sup> of inmates and the increase in need for longer and more comprehensive residential reentry programming, the Bureau of Prisons' rule, which caps placement at six months and fails to conduct individual assessments, is inconsistent with the social policy advocated by the statute.

Although § 3621(b) directed the Bureau of Prisons to designate the place of imprisonment, the contextualization of the statute further demonstrates that Congress' intent was clear and unambiguous.

*b. The Statutory Context of 18 U.S.C. § 3621(b)*

In the Second Chance Act, Congress made several substantial changes to § 3624(c), the companion statute to § 3621(b), that indicate the Bureau of Prisons is not presumptively entitled to limit an inmate's placement to six months. Congress continued to require the Bureau of Prisons to provide a set of conditions for each inmate to foster successful

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253. See Travis, et al, *supra* note 7. See also, e.g., MILES D. HARER, FED. BUREAU OF PRISONS, RECIDIVISM AMONG FEDERAL PRISONERS RELEASED IN 1987 21–22 (1994), available at [http://www.bop.gov/news/research\\_projects/published\\_reports/recidivism/oreprrecid87.pdf](http://www.bop.gov/news/research_projects/published_reports/recidivism/oreprrecid87.pdf); Michael Pinard, *Collateral Consequences of Criminal Convictions: Confronting Issues of Race and Dignity*, 85 N.Y.U. L. REV. 457, 483 (2010); *California Defends DNA Sampling Law in 9th Circuit*, *Haskell v. Brown*, 7 WESTLAW J. EXPERT & SCIENTIFIC EVIDENCE 3 (2010); THE SENTENCING PROJECT, RECIDIVISM OF STATE PRISONERS: IMPLICATIONS FOR SENTENCING AND CORRECTIONS POLICY (2002), available at [http://www.sentencingproject.org/doc/publications/inc\\_recidivstate.pdf](http://www.sentencingproject.org/doc/publications/inc_recidivstate.pdf) (finding nearly two thirds recidivate).

254. *Editor's Notes*, 20 FED. SENT'G REP. 74 (2007) ("Policy makers have increasingly come to recognize the importance of providing greater support to offenders throughout the reentry process, as illustrated, for instance, by passage of the Second Chance Act in the House of Representatives in November 2007. Growing attention to the challenges of successful reentry may ultimately affect the work not only of social services agencies but also of the court system and law enforcement agencies. For instance, some communities are now experimenting with specialized reentry courts that give judges a pivotal, coordinating role in managing reentry.").

255. There has been an increase in the number of female prisoners entering the system and an increase in the number of elderly prisoners in the system. PETERSILIA, *supra* note 98, at 21–54.

reentry.<sup>256</sup> In the first sentence of § 3624(c), similar to prior versions, Congress used the word “shall” to obligate the Bureau of Prisons to provide a set of “conditions that will afford that prisoner a reasonable opportunity to adjust to and prepare for the reentry of that prisoner into the community.”<sup>257</sup> Although the Bureau of Prisons has this duty, Congress, recognizing that there may be limitations, was not “tying the hands of administrators in deciding where prisoners are to be placed.”<sup>258</sup> Hence, Congress included the phrase “to the extent practicable.”<sup>259</sup> By inserting this phrase as a modifier of the mandatory requirement, Congress acknowledged that the Bureau of Prisons may not be able to fulfill this duty at all times, thereby creating a qualified affirmative obligation.<sup>260</sup> The more controversial parts of the sub-section, however, are the time limits, contained in § 3624(c), on the Bureau of Prisons’ placement discretion.<sup>261</sup>

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256. 18 U.S.C. § 3624(c) (2010).

257. *Id.* (“The Director of the Bureau of Prisons shall, to the extent practicable, ensure that a prisoner serving a term of imprisonment spends a portion of the final months of that term (not to exceed 12 months), under conditions that will afford that prisoner a reasonable opportunity to adjust to and prepare for the reentry of that prisoner into the community. Such conditions may include a community correctional facility.”); *Goldings v. Winn*, 383 F.3d 17, 23 (1st Cir. 2004) (interpreting old § 3624(c): “By its plain language, § 3624(c) provides that the BOP ‘shall take steps’ to ‘assure’ that prisoners serve a reasonable part of the last ten percent of their prison terms ‘under conditions that afford the prisoner a reasonable opportunity to adjust to and prepare for the prisoner’s reentry into the community.’ This language imposes an affirmative obligation on the BOP to take steps to facilitate a smooth re-entry for prisoners into the outside world. It is true that this obligation is qualified. Section 3624(c) does not mandate placement in a CCC prior to release, and it requires the BOP to assure that a prisoner spends the last part of his sentence under pre-release conditions only if practicable. However, a qualified obligation differs from a grant of discretion.”); *Prows v. Fed. Bureau of Prisons*, 981 F.2d 466, 470 (10th Cir. 1992) (“§ 3624(c) [operates] as a legislative directive focusing on the development of conditions to facilitate an inmate’s adjustment to free society, whatever the institution of pre-release confinement.”).

258. *Goldings*, 383 F.3d at 20–21 (“Under § 3624(c), the BOP *must* ensure placement under pre-release conditions except where no such placement is practicable. . . . The provision thus reflects Congress’s intent to impose upon the agency a duty to prepare prisoners for reentry into the community, without tying the hands of administrators in deciding where prisoners are to be placed. The BOP is not free to disregard that duty.”).

259. 18 U.S.C. § 3624(c) (2010).

260. *Wedelstedt v. Wiley*, 477 F.3d 1160, 1166 (10th Cir. 2007); *Goldings*, 383 F.3d at 23; *Monahan v. Winn*, 276 F. Supp. 2d 196, 210 (1st Cir. 2003) (“The plain language of § 3624(c) places no curbs on BOP discretion as to place of confinement prior to the last six months or 10% of confinement. The provision’s purpose is not to set strict conditions on when the BOP *can* designate a prisoner to community confinement. The statute in fact burdens the BOP with a duty (albeit a “qualified” one).”). *See also* *Prows v. Fed. Bureau of Prisons*, 981 F.2d 466, 469 (10th Cir. 1992); *Ferguson v. Ashcroft*, 248 F. Supp. 2d 547, 572 (D. La. 2003).

261. *Wedelstedt*, 477 F.3d at 1165–66; *Muniz v. Sabol*, 517 F.3d 29, 36–38 (1st Cir. 2008); *Fults v. Sanders*, 442 F.3d 1088, 1090–92 (8th Cir. 2006); *Levine v. Apker*, 455 F.3d

Prior to the passage of the Second Chance Act, § 3624(c) contained the following language:

The Bureau of Prisons shall, to the extent practicable, assure that a prisoner serving a term of imprisonment spends a reasonable part, not to exceed six months, of the last 10 per centum of the term to be served under conditions that will afford the prisoner a reasonable opportunity to adjust to and prepare for the prisoner's re-entry into the community.<sup>262</sup>

Some interpreted this as a limitation on the Bureau of Prisons' placement discretion,<sup>263</sup> while others viewed it as having no effect at all.<sup>264</sup> In the Second Chance Act, Congress specifically increased the overall maximum amount of placement time in any community correctional facility to twelve months<sup>265</sup> while simultaneously limiting an inmate's placement in home confinement<sup>266</sup> to the lesser of ten percent or six months.<sup>267</sup> The plain text of the statute made it clear that an inmate is eligible to be placed in a community correctional facility, which includes a halfway house, for up to twelve months.<sup>268</sup> The six-month limitation is reserved solely for home confinement, which Congress made explicit by setting the home confinement provision apart.<sup>269</sup> Congress clearly expressed its intent that home confinement is the only condition under which an inmate's time in a community correctional facility is limited to the final ten percent of the inmate's sentence or a maximum of six months.

Another textual change that is instructive as to Congress' intent is § 3624(c)(6). In this sub-section, Congress required the Bureau of Prisons

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71, 85–87 (2d Cir. 2007); *Woodall v. Fed. Bureau of Prisons*, 432 F.3d 235, 249–51 (3d Cir. 2005); *Elwood v. Jeter*, 386 F.3d 842, 846–47 (8th Cir. 2004); *Goldings*, 383 F.3d at 25–26.

262. 18 U.S.C. § 3624(c) (2006).

263. The Bureau of Prisons' position prior to 2002 was that its placement discretion was not limited. After the Office of Legal Counsel's memorandum proclaiming that the Bureau of Prisons' interpretation was unlawful, the Bureau of Prisons changed its position. Previous courts have ruled that the time limits restrict the Bureau of Prisons' consideration of transferring an inmate to a halfway house until ten percent of the sentence remains. They have also held that the statute limits the amount of time that an inmate can serve in a halfway house to the lesser of either six months or ten percent of the sentence. For an in-depth recounting of the numerous changes and legal maneuverings, see *supra* Part II.

264. Other courts have held that time limits do not place any barriers on when and for how long a placement can be. For an in-depth recounting of the numerous changes and legal maneuverings, see *supra* Part II.

265. 18 U.S.C. § 3624(c) (2010).

266. MARCUS NIETO, *THE CHANGING ROLE OF PROBATION IN CALIFORNIA'S CRIMINAL JUSTICE SYSTEM* 53 (1996) ("Home confinement is a judicial or administratively imposed condition that requires an offender to remain in his or her residence for any portion of the day").

267. 18 U.S.C. § 3624(c) (2010).

268. See *id.* § 3624(c)(1).

269. Compare 18 U.S.C. § 3624(c)(2006), with 18 U.S.C. § 3624(c) (2010).

to issue regulations that complied with the amendments in the Second Chance Act. The sub-section reads,

The Director of the Bureau of Prisons shall issue regulations pursuant to this subsection not later than [ninety] days after the date of the enactment of the Second Chance Act of 2007, which shall ensure that placement in a community correctional facility by the Bureau of Prisons is—(A) conducted in a manner consistent with section 3621(b) of this title; (B) determined on an individual basis; and (C) of sufficient duration to provide the greatest likelihood of successful reintegration into the community.<sup>270</sup>

Congress required the Bureau of Prisons to adopt a set of regulations that would provide the greatest opportunity for an inmate to reenter society successfully. Moreover, this sub-section stated unequivocally that the Bureau of Prisons' placement was to be an individualized process<sup>271</sup> and "of sufficient duration to provide the greatest likelihood of successful reintegration into the community."<sup>272</sup> Most importantly, this sub-section mandated that the Bureau of Prisons' regulations were to be "conducted in a manner consistent with § 3621(b)."<sup>273</sup> This sub-section offers the most compelling evidence of Congress' intent that halfway house placement is not only to be individualized, but also that the Bureau of Prisons is to use the five factors in § 3621(b).<sup>274</sup> It is clear from the text alone that the Bureau of Prisons exceeded the bounds of its discretion. The extraordinary justification exception rule as promulgated did not adhere to §§ 3621(b) and 3624(c). This conclusion is bolstered even further by looking at the purpose of the Second Chance Act.

The overall purpose of the Second Chance Act was to reduce recidivism and to increase public safety.<sup>275</sup> In an effort to address these dual concerns at the federal level, Congress dedicated a section in the Second Chance Act to improving federal reentry initiatives<sup>276</sup> and providing incentives to prisoners to participate in reentry skill development.<sup>277</sup> Congress also recommended that the Bureau of Prisons use the

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270. 18 U.S.C. § 3624(c) (2010).

271. *Id.* § 3624(c)(6)(B).

272. *Id.* § 3624(c)(6)(C).

273. *Id.* § 3624(c)(6)(A).

274. *Cf.* *Lopez v. Davis*, 531 U.S. 230, 237 (2001) ("The statute [(Section 3621(e)(2)(B))] grants no entitlement to any inmate or class of inmates, the Court of Appeals noted, and it does not instruct the Bureau to make 'individual, rather than categorical, assessments of eligibility for inmates convicted of nonviolent offenses.'").

275. 42 U.S.C. § 17501(a)(1) (2010) ("The purposes of this Act are- (1) to break the cycle of criminal recidivism, [and] increase public safety.").

276. *Id.* § 17541.

277. *Id.* § 17541(a)(2).

maximum amount of time allotted for halfway house placement as an incentive to encourage inmates to take advantage of reentry programming.<sup>278</sup> Congress further recognized that the federal reentry initiative should tailor reentry programs to the individual and not consider reentry as a one-size-fits-all approach.<sup>279</sup> Thus, while Congress could have accepted the Bureau of Prisons' statutory interpretations reflected in the 2002 and 2005 Rules, it did not.

It is safe to assume that Congress was aware of the lack of support from the judiciary, the defense bar and other reentry stakeholders that accompanied the Bureau of Prisons' prior rule changes, and could have easily retained the ten percent, six-month policy.<sup>280</sup> By doing so, Congress would have authorized the Bureau of Prisons' practice of limiting halfway house placement to six months, and given tacit approval of the Bureau of Prisons' categorical exercise of discretion in designating an inmate's place of imprisonment. It did not. In the alternative, Congress could have elected to give the Bureau of Prisons unfettered discretion. Congress chose neither of these options. Instead, Congress increased the time limit for placement.<sup>281</sup> Congress also stated that the maximum amount of time in a halfway house should be offered as an incentive for inmates to participate in "reentry and skills development," thus demonstrating the importance that Congress placed on the usefulness of such facilities.<sup>282</sup> As previously noted, Congress explicitly required the Bureau of Prisons to issue regulations that were consistent with § 3621(b)<sup>283</sup> and highlighted the need for individual assessments prior to placement.<sup>284</sup>

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278. *Id.* ("Incentives for a prisoner who participates in reentry and skills development programs which may, at the discretion of the Director, include—(A) the maximum allowable period in a community confinement facility.").

279. *Id.* § 17541(a)(1) ("The establishment of a Federal prisoner reentry strategy to help prepare prisoners for release and successful reintegration into the community, including, at a minimum, that the Bureau of Prisons— (A) assess *each* prisoner's skill level . . . at the beginning of the term of imprisonment of that prisoner . . . ; (B) generate a skills development plan for *each* prisoner . . . ; (D) ensure that priority is given to the reentry needs of high-risk populations . . . ; [and] (F) collect information about *a prisoner's* family relationships . . . and support systems during incarceration and after release from custody.") (emphasis added).

280. The Bureau of Prisons policy was changed in 2002 and then amended in 2005. In the interim, there were numerous legal challenges as well as scholarly commentary about the impact of the policy. See Bussert et al., *supra* note 29; Borges, *supra* note 31.

281. Compare 18 U.S.C. § 3624(c) (2010) with 18 U.S.C. § 3624(c)(1) (1984). In each version of the statute prior to 2008, the statute capped the maximum length of time at six months.

282. 42 U.S.C. § 17541(a)(2)(A) (2010).

283. 18 U.S.C. § 3624(c) (2010). Congress' directive to the Bureau of Prisons was to adopt a practice and policy that did not conflict with 18 U.S.C. § 3621 (i.e., failing to conduct individualized assessments using the five factors).

284. 18 U.S.C. § 3624(c) (2010).

The extraordinary justification exception rule does not accomplish those goals.

Lastly, a reviewing court would likely determine that Congress did not intend for the Bureau of Prisons to enact a policy that would limit placement, thereby undermining the goals of reentry. The Court has stated that “we must be guided to a degree by common sense as to the manner in which Congress is likely to delegate a policy decision of such economic and political magnitude to an administrative agency.”<sup>285</sup> The economic importance of halfway house placement is clear. Inmates that are placed in halfway houses are more likely to succeed and not recidivate.<sup>286</sup> The more time that an inmate spends in a halfway house, the greater the reduction in incarceration costs, which means that limited resources can be diverted elsewhere.<sup>287</sup> The restricted use of halfway houses under the extraordinary justification exception rule keeps incarceration costs high because it caps the length of time that an inmate can spend in a halfway house.<sup>288</sup> In addition to these economic issues, there is also a political component. Reentry as a social policy has achieved national importance and continues to garner attention.<sup>289</sup> The fact that Congress amended the provisions that govern halfway house placement in the Second Chance Act is a strong indication that Congress intended the placement of federal inmates in such facilities to be commonplace, not limited. In omitting a specific time limit for placement, Congress allowed the Bureau of Prisons to place an inmate in a halfway house for a period of time that satisfies the statutory demands of § 3624(c). Congress did not intend for the Bureau of Prisons to create a presumption limiting an inmate’s placement to six months.

The question of whether the Bureau of Prisons has the discretion to restrict an inmate’s halfway house placement to six months was

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285. *Food & Drug Admin. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000).

286. FED. BUREAU OF PRISONS, PROGRAM STATEMENT 7310.04, *supra* note 15 (“Participating in community-based transitional services may reduce the likelihood [that] an inmate with limited resources [will] recidivat[e], whereas an inmate who is released directly from the institution to the community may return to a criminal lifestyle.”).

287. See Bussert et al., *supra* note 29, at 26 (“In its 2004 comments, the ABA noted that, in August 2002, the House of Delegates approved the *20-Point Blueprint for Cost-Effective Pretrial Detention, Sentencing and Corrections Systems*. The blueprint promotes the use of community corrections among other reasoned, cost-effective measures.”).

288. In addition to increasing reentry costs, the Bureau of Prisons’ repeated attempts to change its rule to avoid judicial review has resulted in numerous challenges for almost a decade. Those resources could have been put to better use. See Cooksey & Erlewine Memo, *supra* note 17; Conley & Kenney Memo, *supra* note 14.

289. Reentry and the disabilities that ex-offenders suffer due to a conviction continue to be both a national and international topic of discussion. See *supra* Part I; see also, e.g., *BARRIERS TO REENTRY?: THE LABOR MARKET FOR RELEASED PRISONERS IN POST-INDUSTRIAL AMERICA* (Bushway et al. eds., 2007); *CIVIL PENALTIES, SOCIAL CONSEQUENCES* (Christopher Mele et al. eds., 2005); Clear, Waring & Scully, *supra* note 8.



addressed in clear and unambiguous statutory language. Inmate challenges to the Bureau of Prisons' limiting of an inmate's placement in a halfway house to six months has not been met with much success.<sup>290</sup> The fact that the Bureau of Prisons has conducted its assessment pursuant to the five factors in § 3621(b) has been considered as satisfying its statutory mandate under the Second Chance Act.<sup>291</sup> The problem with this assessment is that it disregards the Bureau of Prisons' lack of evidence that six months is a sufficient amount of time to accomplish the goals of reentry.<sup>292</sup> The placement recommendations thus become relative. If a unit team is aware that placements are capped at six months, especially in light of the sentiment that such resources are scarce and should be used sparingly, then all other placements are made relative to the maximum.<sup>293</sup>

If, however, a court were to find that Congress was not clear and ambiguous, the court would proceed to review the rule under step two of *Chevron*, assessing whether the Bureau of Prisons' interpretation was reasonable. Although courts rarely disagree with an agency's interpretation of an ambiguous statute,<sup>294</sup> the Bureau of Prisons would not prevail in this instance.

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290. See *Sacora v. Thomas*, 628 F.3d 1059 (9th Cir. 2010); *Stanko v. Obama*, 393 F. App'x. 849 (3d Cir. 2010); *Garza v. Davis*, 596 F.3d 1198 (10th Cir. 2010).

291. See cases cited *supra* note 290.

292. *Sacora*, 628 F.3d at 1068–69 (“The court has said that while statistical evidence would be beneficial it is not warranted because of an agency’s experience. In this instance, however, the agency’s own actions prior to the policy change in 2002 indicated otherwise. In this case, the BOP relied on ‘Bureau experience’ to explain its choice to require unusual circumstances and additional checks before placing prisoners in RRCs for longer than six months. It may have been preferable for the BOP to support its conclusions with empirical research. However, it was reasonable for the BOP to rely on its experience, even without having quantified it in the form of a study.”). See, e.g., *Motor Vehicle Mfrs. Ass’n of the U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (“Normally, an agency rule would be arbitrary and capricious if the agency . . . offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.”).

293. *Rosario v. Scism*, No. 1:10-CV-2600, 2011 WL 398200, at \*8 (M.D. Pa. Jan. 20, 2011); *Vicaretti v. Ziegler*, No. 1:10cv91, 2010 WL 4876608, at \*5 (N.D. W.Va. Oct. 27, 2010); *Banks v. Ziegler*, No. 5:10cv69, 2010 WL 3521586, at \*5 (N.D. W.Va. Sept. 7, 2010) (“[I]t is the BOP’s experience that inmate’s re-entry needs can usually be met with 6 months or less in an RRC. An RRC placement beyond 6 months will only be approved upon a showing of an inmate’s extraordinary and compelling re-entry needs. The BOP will continue to balance each inmate’s individual needs with the agency’s duty to use its limited resources judiciously and to provide re-entry services as to many inmates as possible.”).

294. Jack M. Beermann, *End the Failed Chevron Experiment Now: How Chevron Has Failed and Why It Can and Should be Overruled*, 42 CONN. L. REV. 779, 810–11 (2010); Donald S. Dobkin, *The Rise of the Administrative State: A Prescription for Lawlessness*, 17 KAN. J.L. & PUB. POL’Y 362, 373–74 (2008) (“To date, an agency’s decision has not been invalidated

## 2. Step Two—Unreasonable Interpretation

After having concluded that a statute's language is either silent or ambiguous as to a particular question, under step two of *Chevron*, a court will review an agency's interpretation to determine whether it was reasonable. If the court finds the interpretation to be reasonable, the court will defer to the agency.<sup>295</sup> This deference reflects the court's acknowledgement of the agency's expertise and legitimacy, which derives from agencies' democratic accountability.<sup>296</sup>

In conducting a step-two analysis, courts will look to statutory materials and the agency's reasoning process.<sup>297</sup> Because the reliance upon statutory materials resembles the analysis undertaken at step one, it

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by the Supreme Court under step two of *Chevron* (though several Courts of Appeal have done so)." (citing STEVEN G. BREYER ET AL., *ADMINISTRATIVE LAW AND REGULATORY POLICY* 289–90 (5th ed. 2002)); Claire R. Kelly, *The Brand X Liberation: Doing Away With Chevron's Second Step as Well as Other Doctrines of Deference*, 44 U.C. DAVIS L. REV. 151, 172–73 (2010).

295. *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 844–45, 865–66 (1984). *Cf.* *CSX Transp. v. United States*, 867 F.2d 1439, 1445 (D.C. Cir. 1989) (Edwards, J., dissenting) (finding judicial deference under *Chevron* to be inconsistent with the traditional role of the courts to determine federal law); John F. Duffy, *Administrative Common Law in Judicial Review*, 77 TEX. L. REV. 113, 193–94 (1998) (concluding that courts should not defer to agencies when there is a question of statutory interpretation, stating: "The first sentence of Section 706 of the APA requires a reviewing court to 'decide all relevant questions of law' and to 'interpret constitutional and statutory provisions.' The legislative history of the APA leaves no doubt that Congress thought the meaning of this provision plain. As Representative Walter, Chairman of the House Subcommittee on Administrative Law and author of the House Committee Report on the bill, explained to the House just before it passed the bill, the provision 'requires courts to determine independently all relevant questions of law, including the interpretation of constitutional or statutory provisions' . . . The plain language alone suggests de novo review of statutory issues."); Cynthia Farina, *Statutory Interpretation and the Balance of Power in the Administrative State*, 89 COLUM. L. REV. 452, 457 (1989) (discussing that *Chevron* expanded the definition of deference); Thomas Merrill, *Judicial Deference to Executive Precedent*, 101 YALE L.J. 969, 997–98 (1992) (noting that the courts are responsible for constraining agency action. "In the end, the primary protection against arbitrary or aggrandizing action by agencies must remain the fundamental constitutional limitation on all executive action—that it 'comport with the terms set in legislative directives.' And the only effective institutional mechanism for preserving this constraint is judicial review.").

296. *Chevron*, 467 U.S. at 844–45, 865–66. *See also* *Food & Drug Admin. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132 (2000). *See generally* A GUIDE TO JUDICIAL AND POLITICAL REVIEW OF FEDERAL AGENCIES, *supra* note 213, § 3.031 at 85.

297. Provided that the agency interpretation is reasonable, the court has recognized that "legislative delegation" to an agency is often "implicit" and will not replace the agency's interpretation with its own. *Chevron*, 467 U.S. at 844; *NationsBank of N.C. v. Variable Annuity Life Ins. Co.*, 513 U.S. 251, 257 (1995)).

has been suggested that such analysis only take place at step one.<sup>298</sup> This Article adopts that position and will limit the step-two analysis of the reasonableness of the Bureau of Prisons' actions to the agency's reasoning process. To determine reasonableness, courts assess whether the agency's interpretation is supported by a reasonable explanation and is logically coherent.<sup>299</sup> Although it is rare that a court will determine an agency's actions to be unreasonable, it is not unprecedented.<sup>300</sup> This type of examination is also known as arbitrary and capricious review,<sup>301</sup> which is the review conducted under the Administrative Procedures Act.<sup>302</sup>

Step-two review is not restricted to a single methodology.<sup>303</sup> The *Chevron* Court noted that a court must affirm the agency's interpretation

298. Levin, *supra* note 245, at 1279–80; A GUIDE TO JUDICIAL AND POLITICAL REVIEW OF FEDERAL AGENCIES, *supra* note 213, at 87 (agreeing with Professor Levin's assessment of examining statutory materials at *Chevron* step-one).

299. Ronald M. Levin, *A Blackletter Statement of Federal Administrative Law*, 54 ADMIN. L. REV. 1, 37–38 (2002) (discussing the principles under which courts review an agency's action and logical coherence is but one).

300. See Lisa Schultz Bressman, Schechter Poultry at the Millennium: A Delegation Doctrine for the Administrative State, 109 YALE L.J. 1399, 1400 n.5 (2000).

301. Arbitrary and capricious review has been described in a variety of ways, which leaves the standard of review unclear. See, e.g., *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971) (describing the arbitrary and capricious review as “searching and careful” but maintaining that it is “a narrow one.” By referencing that the court must not substitute its own judgment for the agency, the standard of review approximates the reasonableness standard); *FCC v. Fox Television Stations, Inc.*, 129 S. Ct. 1800, 1823 (2009) (“Congress passed the Administrative Procedure Act (APA) to ensure that agencies follow constraints even as they exercise their powers. One of these constraints is the duty of agencies to find and formulate policies that can be justified by neutral principles and a reasoned explanation. To achieve that end, Congress confined agencies’ discretion and subjected their decisions to judicial review. If an agency takes action not based on neutral and rational principles, the APA grants federal courts power to set aside the agency’s action as ‘arbitrary’ or ‘capricious.’ For these reasons, agencies under the APA are subject to a “searching and careful” review by the courts.”) (citations omitted); *Angelica Textile Servs., Inc. v. United States*, 95 Fed. Cl. 208, 218 (2010) (“When a court reviews a challenge to agency action that is alleged to be arbitrary or capricious or an abuse of discretion, it is obliged to ‘determine whether the contracting agency provided a coherent and reasonable explanation of its exercise of discretion’”) (citations omitted).

302. 5 U.S.C. § 706(2)(A) (2010) (“The reviewing court shall . . . hold unlawful and set aside agency action, findings, and conclusions found to be . . . arbitrary, capricious, [or] an abuse of discretion . . .”).

303. Michael Herz, *The Rehnquist Court and Administrative Law*, 99 NW. U. L. REV. 297, 315 (2004); Beermann, *supra* note 294, at 815–22; Bressman, *supra* note 300, at 1411–15. For an evaluation of lower courts’ unwillingness to invalidate an agency’s interpretation, see generally Orin S. Kerr, *Shedding Light on Chevron: An Empirical Study of the Chevron Doctrine in the U.S. Courts of Appeals*, 15 YALE J. ON REG. 1 (1998). But see, e.g., *Whitman v. Am. Trucking Ass’ns*, 531 U.S. 457, 481 (2001) (finding that the statute was ambiguous and that the “agency’s interpretation goes beyond the limits of what is ambiguous and contradicts what in our view is quite clear.”); *AT&T v. Iowa Util. Bd.*, 525 U.S. 366, 387–92

even if it is not convinced that the agency's interpretation is the only one or the interpretation that the court would have reached.<sup>304</sup> The agency's interpretation is therefore not impermissible merely because it differs from other potential interpretations.<sup>305</sup> Under this review, the Court has stated:

[A]n agency rule would be arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.<sup>306</sup>

The Bureau of Prisons has arbitrarily and capriciously selected six months as the presumed maximum length of placement for all inmates.<sup>307</sup>

To briefly reiterate, the Bureau of Prisons claimed the following. First, based upon agency experience, six months was enough time for an inmate to adequately prepare for reentry.<sup>308</sup> Second, the extraordinary justification exception rule incorporated the five factors required under § 3621(b).<sup>309</sup> Third, the extraordinary justification exception did not

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(1998) (discussing that the commission did use a "rational basis" in its interpretation of the statute).

304. *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843 n.11 (1984). See also *Mayo Found. for Med. Educ. and Research v. United States*, 131 S.Ct. 704, 713 (2011); *Nat'l Ass'n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 665 (2007); *Rust v. Sullivan*, 500 U.S. 173, 184 (1991).

305. *Chevron*, 467 U.S. at 843 n.11.

306. *Motor Vehicle Mfrs. Ass'n of the U.S. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

307. *Regional Hearing on the State of Federal Sentencing*, W.D. Tex. (Nov. 20, 2009) (statement of Harley G. Lappin, Director, Fed. Bureau of Prisons), 9–10 ("Most inmates with short sentences are appropriately placed in federal prison camps, which are minimum security, much less costly than RRCs and offer a wide variety of inmate programs; and most releasing offenders receive the necessary transitional assistance in three to four months at an RRC"); see also *Proceedings from the Symposium on Alternatives to Incarceration*, U.S. SENTENCING COMM'N, 272 (July 14–15, 2008), [http://www.ussc.gov/Research/Research\\_Projects/Alternatives/20080714\\_Alternatives/14\\_FINAL\\_FocusReentry.pdf](http://www.ussc.gov/Research/Research_Projects/Alternatives/20080714_Alternatives/14_FINAL_FocusReentry.pdf) (finding that the Bureau of Prisons has indicated that inmates do not need more than six months and has expressed that four months may be enough to accomplish the goals of reentry).

308. *Proceedings from the Symposium on Alternatives to Incarceration*, *supra* note 306, at 272 (Summary) ("... BOP studies indicate that an inmate can receive the full benefit of a Residential Reentry Center after only six months.").

309. *Woodall v. Fed. Bureau of Prisons*, 432 F.3d 235, 247–48 (3d Cir. 2005) ("The BOP has stated, and the District Court agreed, that it considered the statutory factors in promulgating the 2005 rules.").

restrict an inmate's placement.<sup>310</sup> And fourth, the interpretation of § 3621(b) should be considered the same as the interpretation of § 3621(e), which was held to be valid in *Lopez*.<sup>311</sup> The Bureau of Prisons' reasons are inaccurate.

The Bureau of Prisons' data appear to be anecdotal and unsupported. Discovery requests seeking supporting additional statistical information have gone unanswered.<sup>312</sup> The Bureau of Prisons' rule promulgated pursuant to the Second Chance Act exceeds its statutorily granted discretion. Congress delegated the discretion to designate the place of imprisonment and to provide reentry programs for an inmate. Congress did not grant the Bureau of the Prisons the authority to incorporate the five factors into its rule. A rule that requires an additional factor and caps the maximum amount of time contravenes the agency's statutory mandate.

The policy also contravened the Bureau of Prisons' pre-2002 statutory interpretation. To be sure, a change in an agency's statutory interpretation does not signify that the new interpretation is unreasonable.<sup>313</sup> In other words, a change in an agency's statutory interpretation should not indicate that the agency did not initially use proper reasoning when interpreting the statute. The OLC motivated the initial change in the policy<sup>314</sup> and found the Bureau of Prisons' statutory interpretation to be erroneous, thus unlawful.<sup>315</sup> In addition to the legal basis for finding the Bureau of Prisons' interpretation illegal, there was also the perception that the policy was applied disproportionately to white collar offenders, thus benefitting them more often than other offenders.<sup>316</sup> By extension, it was perceived that this type of placement indicated a practice of bias in

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310. See *Daraio v. Lappin*, No. 3:08CV1812(MRK), 2009 WL 303995, at \*5 (D. Conn. Feb. 9, 2009) ("[I]t is permissible for the BOP to search for 'extraordinary justification' before granting an RRC placement in excess of 180 days provided that the BOP considers the five-factor statutory list. This is so because 'extraordinary justification' essentially acts as a 'standard for deciding whether to grant a request for extended placement in an RRC.'" (citations omitted)); *Fariduddin v. Morrison*, No. 06-286, 2007 WL 107678, at \*1 (D. Minn. Jan. 10, 2007) ("[R]equiring 'extraordinary justification' to extend CCC placement beyond six months does not violate § 3621(b) because it does not preclude the completion of an individualized assessment. Indeed, it implies that an individualized determination is necessary to determine whether CCC placement beyond six months is warranted.").

311. *Lopez v. Davis*, 531 U.S. 230, 232 (2001).

312. See Memorandum in Support of Amended Petition, *supra* note 88, at Attachment A.

313. *Rust v. Sullivan*, 500 U.S. 173, 186-87 (1991); *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.* 467 U.S. 837, 863-64 (1984); see also *Indep. Bankers Ass'n v. Farm Credit Admin.*, 164 F.3d 661, 668 (D.C. Cir. 1999).

314. OLC Memo, *supra* note 46.

315. *Id.*

316. *Bussert et al.*, *supra* note 29, at 22-23.

favor of class status and gender.<sup>317</sup> Although that may have been the perception, it was unfounded.<sup>318</sup> Most notably, the change in the policy will have a negative impact on female inmates, specifically African American women.<sup>319</sup>

The Bureau of Prisons' halfway house placement policy was hijacked by politics and bad press, not proof.<sup>320</sup> Rather than maintain its open transfer policy, the Bureau of Prisons conceded, adopted a new rule in 2002, and promulgated a policy that was contrary to its statutory mandates and contrary to congressional intent.

The Bureau of Prisons stated that its discretion under § 3621(b) was similar to that exercised under § 3621(e), which was upheld in *Lopez*.<sup>321</sup> Several courts held correctly that the language of § 3621(e) was ambiguous, enabling the Bureau of Prisons to provide an interpretation to fill the statutory gap left by Congress. That is not the case with § 3621(b), which has no such gap. Congress laid out the five factors to be used and repeatedly emphasized their importance for conducting individualized assessments. Given the language of § 3621(b), any policy that would place an inmate in a halfway house for a set period of time prior to evaluating that inmate under the statutory factors is arbitrary and capricious and therefore does not deserve deference.

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317. See Eric Lichtblau, *Criticism of Sentencing Plan for White-Collar Criminals*, N.Y. TIMES, Dec. 26, 2002, at C2; Bussert et al., *supra* note 29, at 23 (“[M]ore than a third of the prisoners designated to serve their entire sentences in CCCs at the time the policy changed were female, even though women comprise less than 7 percent of the general federal prison population.” (citing *Cutler v. United States*, 241 F. Supp. 2d 19, 23 n.3 (D. D.C. 2003))).

318. Bussert et al., *supra* note 29, at 23. (“[BOP] officials said that halfway houses have been used for nonviolent offenders for at least 20 years. ‘The point is that it’s not just white-collar offenders who have benefited from this longstanding practice . . . There are a lot of drug offenders, single moms and ordinary folks who aren’t wealthy people who have benefited from this. It’s not just Enron types.’” (citation omitted)).

319. See Bussert, *supra* note 57; Borges, *supra* note 31, at 142 (“It is important to note that most of the prisoners affected by the policy [see *supra* Part I.B. for a discussion of the 2002 Policy] are not corporate tycoons, but rather, single mothers on welfare, low-end drug dealers, check forgers, and student loan offenders.”).

320. Pre-2002 news reports provide indication that halfway houses are for white collar offenders only and may be too lenient. Jim Morrill, *Culp’s Term Reduced by Drug Rehab Cut Termed ‘Unwarranted’*, CHARLOTTE OBSERVER, Sept. 14, 2000, at 1B; Dwight Ott & Angela Coulombis, *Milan Sent to a Prison in Penna; He Will Serve Time at a Facility Several Hundred Miles from His Family. The Site Meets an Accessibility Guideline*, PHILA. INQUIRER, July 14, 2001, at B01 (“Convicted former Mayor Milton Milan was transferred yesterday to a low-security federal prison in Loretto, Pa., 252 miles—and a 4 1/2-hour drive—away from here. Milan, 38, who was sentenced last month to serve seven years and three months on corruption charges, was transferred to Loretto from the federal prison in Fairton, Cumberland County. The Loretto facility, a converted monastery in a small town near Altoona, houses 1,085 inmates, most of whom are nonviolent offenders convicted of white-collar crimes, said Thomas Webber of the U.S. Bureau of Prisons”).

321. *Lopez v. Davis*, 531 U.S. 230, 232 (2001).

A court evaluating the Bureau of Prisons' reasoning process should determine that the agency's statutory interpretation of § 3621(b) was unreasonable. Past challenges, especially to the 2005 Rule,<sup>322</sup> indicate that courts are likely to be divided. In fact, the Eighth Circuit, which sided with the petitioners when challenging the 2005 Rule, has since reversed course with respect to challenges to the new extraordinary justification exception rule.<sup>323</sup> A review under step two may result, incorrectly, in an affirmation of the extraordinary justification exception rule depending upon the circuit because courts are less rigorous and more deferential at step two. In an effort to increase the rigor of judicial review of agency interpretation, courts have applied a hard look review.<sup>324</sup> Under this doctrine, there is no question that the extraordinary justification exception rule would be found to be an impermissible exercise of discretion and struck down.

### *B. A Hard Look at the Bureau of Prisons' Placement Policy*

In reviewing whether an agency's policy determination was reasonable, courts employ a hard look review,<sup>325</sup> which is a more stringent analysis of an agency's actions than a determination of whether the interpretation was reasonable. Under this type of review, courts tend to look more closely at the "substantive rationality" of the agency's actions and

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322. 28 C.F.R. § 570.21(a) (2010).

323. *Miller v. Whitehead*, 527 F.3d 752, 756 (8th Cir. 2008) ("The inmates here argue that like the regulation in *Fults*, the program statement categorically excluded a class of inmates from the opportunity to be transferred. We reject this contention . . .").

324. Mark Seidenfeld, *Cognitive Loafing, Social Conformity, and Judicial Review of Agency Rulemaking*, 87 CORNELL L. REV. 486, 518 (2002) ("On its face, arbitrary and capricious review, as currently implemented under the 'hard-look' . . . rubric is almost entirely a process-based evaluation. It does not compare the outcome to some ideal that the judge has in mind, and eschews inquiring whether the agency decision, in fact, turned out to be wise. It essentially asks the agency to explain why it reached the outcome it did in light of data available to the agency, alternatives to the outcome, and arguments presented to the agency by those whom the rule will affect."); see also *Motor Vehicle Mfrs. Ass'n of the U.S. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43–44 (1983); *Greater Bos. Television Corp. v. FCC*, 444 F.2d 841, 851 (D.C. Cir. 1970); Jeffrey J. Rachlinski & Cynthia R. Farina, *Cognitive Psychology and Optimal Government Design*, 87 CORNELL L. REV. 549, 588–89 (2002); Cass R. Sunstein, *Deregulation and the Hard Look Doctrine*, 1983 SUP. CT. REV. 177, 181–84 (1983); Harold Levanthal, *Environmental Decisionmaking and the Role of the Courts*, 122 U. PA. L. REV. 509, 511 (1974).

325. *Arkansas v. Oklahoma*, 503 U.S. 91, 112–13 (1992); *State Farm*, 463 U.S. at 43–44; *Bering Strait Citizens for Responsible Res. Dev. v. U.S. Army Corps of Eng'rs*, 511 F.3d 1011, 1020 (9th Cir. 2008) ("Judicial review of agency decision-making under NEPA is limited to the question of whether the agency took a 'hard look' at the proposed action . . ."); *Ethel Corp. v. EPA*, 541 F.2d 1 (D.C. Cir. 1976) (en banc); Sidney A. Shapiro & Richard E. Levy, *Heightened Scrutiny of the Fourth Branch: Separation of Powers and the Requirement of Adequate Reasons for Agency Decisions*, 1987 DUKE L.J. 387, 419 (1987).

also “more broadly at the agency’s reasoning process.”<sup>326</sup> The purpose of a hard look review is to ensure that an agency has taken a critical look at the issue before it,<sup>327</sup> and has employed a reasoned process in its decision-making.<sup>328</sup>

In practice, courts have looked at the relationship between the statutory purposes or requirements and the agency’s interpretation.<sup>329</sup> Courts seek to determine whether there has been a “clear error in judgment” on the agency’s part,<sup>330</sup> or whether the agency’s interpretation “is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.”<sup>331</sup> Moreover, courts will also look at whether the agency has failed to consider key aspects of the issue presented, such as the impact,<sup>332</sup> cost,<sup>333</sup> or “full range of facts affecting its policy decision.”<sup>334</sup> Furthermore, courts have looked to whether the agency has failed to respond to relevant arguments or comments.<sup>335</sup> With this type of review, courts are not merely deferring to the agency’s judgment and thus abdicating judicial responsibility, but rather the court is adhering to its role of critically analyzing the agency’s actions.<sup>336</sup> When courts engage in a hard look review, the admonition that the court is not to substitute its own judgment for that of the agency is still applicable.<sup>337</sup> A hard look review of

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326. *State Farm*, 463 U.S. at 43 n.9; KEITH WERHAN, *PRINCIPLES OF ADMINISTRATIVE LAW* 356 (Thomson/West ed., 2008).

327. *Nat’l Lime Ass’n v. EPA*, 627 F.2d 416, 451 n.126 (D.C. Cir. 1980); *Greater Bos. Television Corp.*, 444 F.2d at 851.

328. *Vt. Yankee Nuclear Power Corp. v. Natural Res. Def. Council, Inc.*, 435 U.S. 519, 549 (1978) (explaining that the focus of judicial review of an agency’s action under the Administrative Procedure Act should be on “the propriety” of the agency’s “contemporaneous explanation” of its decision); *United States v. N.S. Food Prods. Corp.*, 568 F.2d 240, 249 (2d Cir. 1977); *Ethel Corp.*, 541 F.2d at 1; *Greater Bos. Television Corp.*, 444 F.2d at 851; *Citizens to Pres. Overton Park, Inc. v. Volpe*, 401 U.S. 402 (1971).

329. *See, e.g., Verizon Commc’ns, Inc. v. FCC*, 535 U.S. 467, 542 (2002) (Breyer, J., concurring and dissenting) (citing *State Farm*, 463 U.S. at 56); *Athens Cmty. Hosp., Inc. v. Shalala*, 21 F.3d 1176 (D.C. Cir. 1994); *Dugan v. Ramsay*, 727 F.2d 192 (1st Cir. 1984); *Conway v. Watt*, 717 F.2d 512 (10th Cir. 1983).

330. *Citizens to Pres. Overton Park, Inc.*, 401 U.S. at 416.

331. *State Farm*, 463 U.S. at 43.

332. *See, e.g., P.R. Sun Oil Co. v. EPA*, 8 F.3d 73 (1st Cir. 1993); *Am. Iron & Steel Inst. v. EPA*, 115 F.3d 979 (D.C. Cir. 1979).

333. *Timpinaro v. SEC*, 2 F.3d 453 (D.C. Cir. 1993).

334. A GUIDE TO JUDICIAL AND POLITICAL REVIEW OF FEDERAL AGENCIES, *supra* note 213, at 187.

335. *United States v. N.S. Food Prods. Corp.*, 568 F.2d 240, 252–53 (2d Cir. 1977). *But see Am. Mining Cong. v. EPA*, 907 F.2d 1179, 1187–91 (D.C. Cir. 1990) (noting that an agency is not required to discuss every fact or opinion offered); *Thompson v. Clark*, 741 F.2d 401, 408 (D.C. Cir. 1984).

336. Jim Rossi, *Redeeming Judicial Review: The Hard Look Doctrine and the Federal Regulatory Efforts to Restructure the Electric Utility Industry*, 1994 WISC. L. REV. 763, 825–26 (1994).

337. *See Conner v. Burford*, 848 F.2d 1441, 1446 (9th Cir. 1988).



the Bureau of Prisons' presumptive six-month placement policy with extraordinary justification exception rule would uncover that the Bureau of Prisons acted improperly and exceeded the boundaries of its discretion by creating an *a priori* rule that limits an inmate's halfway house placement time to six months.

### 1. The Bureau of Prisons Uses Impermissible Factors

Courts will set aside an agency's action if the agency relied upon factors that are not to be considered or ignored those that must be considered.<sup>338</sup> The extraordinary justification exception rule is an example of the Bureau of Prisons' failure to consider the five factors, as is required under § 3621(b).<sup>339</sup> The implementation of a policy that presumes that a six-month halfway house placement is sufficient to achieve an inmate's reentry needs based upon undocumented agency statements disregards Congress' intent under § 3621(b), and ignores the stated purposes and goals of the Second Chance Act.

An agency's action will be set aside if it was a "clear error in judgment."<sup>340</sup> The purpose of § 3621(b) was to ensure individualized assessments prior to any placement. The extraordinary justification exception rule does not allow that to occur. It undermines the purpose and requirement of § 3621(b) because it presumes the length of an inmate's placement in the absence of an individualized assessment. Recognizing that the Bureau of Prisons may be faced with certain constraints, such as limited facility space or resources, Congress allowed the agency to designate "any available penal or correctional facility" for placement.<sup>341</sup> And yet, while Congress delegated the authority to determine in which facility an inmate would be placed, it also provided a set of guidelines to be used. The Bureau of Prisons is expected to use these guidelines to match an inmate to a specific facility and to determine an inmate's length of stay in

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338. *Natural Res. Def. Council v. Kempthorne*, 506 F. Supp. 2d 322, 347 (E.D. Cal. 2007); *Defenders of Wildlife v. Babbitt*, 958 F. Supp. 670, 685 (D.D.C. 1997) ("Although the Court must defer to an agency's expertise, it must do so only to the extent that the agency utilizes, rather than ignores, the analysis of its experts. Here, the FWS has consistently ignored the analysis of its expert biologists as to each of the five statutory factors, basing its decision on unsupported conclusory statements as well as facts which are directly contradicted by undisputed evidence in the Administrative Record. The FWS decision not to list the Canada Lynx and grant it the protections of the ESA is arbitrary and capricious, applied an incorrect legal standard, relied on glaringly faulty factual premises, and ignored the views of its own experts. Consequently, it must be set aside.") (citation omitted).

339. 18 U.S.C. § 3621(b) (2010).

340. *Citizens to Pres. Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971) ("[T]he court must consider . . . whether there has been a clear error of judgment.") (citations omitted).

341. 18 U.S.C. § 3621(b) (2010).

that particular facility. To assume that each inmate is well-served with a six-month stay in a halfway house ignores the underlying purpose and requirement of the statute to place each inmate according to an individualized assessment. The same can be said for the companion statute, § 3624(c).

The purpose of § 3624(c) is to ensure that an inmate has a reasonable opportunity to reenter society successfully.<sup>342</sup> The presumptive six-month rule thwarts the purpose and requirements of this statute as well. Under this statute, Congress purposefully lengthened the maximum amount of time that can be spent in a halfway house. Congress recognized the inherent difficulties that inmates face upon release and provided a mechanism for increased pre-release assistance. The Bureau of Prisons' rule is contrary to that purpose. The rule theoretically adheres to the requirement that the Bureau of Prisons provides a set of conditions for successful reentry, but the time limit that it has decided is appropriate does not provide a "reasonable opportunity."<sup>343</sup> Apart from a finding that the rule is inconsistent with the statutory purpose and requirements, the Bureau of Prisons also has failed to consider key aspects of offender reentry.

## 2. The Bureau of Prisons Disregards Key Aspects of Offender Reentry

A reviewing court will determine that an agency's action is to be set aside if it did not properly consider specific criteria.<sup>344</sup> Courts have invoked this basis for reversing an agency's decision as a means to invalidate an agency's policy decision. The Bureau of Prisons has stated that the extraordinary justification exception rule is based upon its experience that six months is enough time for an inmate to achieve the goals of reentry.<sup>345</sup> In estimating the amount of time necessary for halfway house placement, the Bureau of Prisons failed to consider an important aspect of the placement issue. The time that an inmate spends in a halfway house is part of a larger legislative overhaul of reentry.<sup>346</sup> The longer the placement time

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342. *Id.* § 3624(c) (describing the Bureau's affirmative duty to a prisoner); *id.* § 3621(b) (describing the Bureau's discretionary authority).

343. *Id.* § 3624(c).

344. A GUIDE TO JUDICIAL AND POLITICAL REVIEW OF FEDERAL AGENCIES, *supra* note 213, at 187 ("An agency action will be set aside if the agency failed, without adequate justification, to give reasonable consideration to an important aspect of the problems presented by the action, such as the effects or costs of the policy choice involved, or the factual circumstances bearing on that choice.").

345. Memorandum in Support of Amended Petition, *supra* note 88, at 52.

346. See Second Chance Act of 2007, Pub. L. No. 110-199, 122 Stat. 657 (2008) (codified in scattered sections of 18 and 42 U.S.C.).

in such a facility, the greater the likelihood that an offender will be successful in his bid to break the cycle of recidivism.<sup>347</sup>

Halfway houses provide an environment where offenders can engage in law-abiding behavior while continuing to be in a structured environment that provides support.<sup>348</sup> The placement affords the offenders the opportunity to participate in law-abiding activity without thrusting them back into the community, without structure and assistance, to the very place where they may have committed their original offense.<sup>349</sup> The halfway house acts as a buffer between prison and the community and provides a controlled environment to address the deficits that may have existed prior to conviction.<sup>350</sup> These conditions afford the inmate a period of readjustment that allows him the opportunity to mitigate the negative effects of prison,<sup>351</sup> and to find stable employment.<sup>352</sup> Research indicates that ex-offenders that are unemployed following release are more likely to recidivate.<sup>353</sup> Hence, any additional time that provides ex-offenders the opportunity to secure and maintain stable employment is beneficial both to the offender, because it reduces recidivism, and to society, because the former offender will be less likely

347. Memorandum in Support of Amended Petition, *supra* note 88, at 22.

348. RICHARD L. PHILLIPS & JOHN W. ROBERTS, QUICK REFERENCE TO CORRECTIONAL ADMINISTRATION 192 (2000) ("Halfway house programs provide an excellent transitional environment for inmates nearing the end of their sentences."); ANTHONY C. THOMPSON, RELEASING PRISONERS, REDEEMING COMMUNITIES: REENTRY, RACE AND POLITICS 173 (2008); *see generally* TRAVIS, *supra* note 96, at 241–42.

349. PHILLIPS & ROBERTS, *supra* note 348, at 192 ("The level of structure and supervision ensures accountability and provides opportunity in employment counseling and placement, substance abuse, and daily life skills."); TRAVIS, *supra* note 96, at 241–42.

350. *See* PHILLIPS & ROBERTS, *supra* note 348, at 192.

351. DONALD CLEMMER, CORRECTIONAL CONTEXTS: CONTEMPORARY AND CLASSICAL READINGS ch. 8 (Edward J. Latessa & Alexander M. Holsinger, eds., 3d ed. 2006); Dennis J. Stevens, *The Impact of Time-Served and Regime on Prisoners' Anticipation of Crime: Female Prisonisation Effects*, 37 HOW. J. CRIM. JUST. 188 (1998); William Thomas Edwards, *How Do Variations in Social Support Resources of Prisoners Correlate with Psychological Distress?*, 69 DISSERTATION ABSTRACTS INT'L, THE HUMANITIES AND SOC. SCI. 1995 (2008).

352. Lappin statement of March 10, 2009, *supra* note 12, at 9 ("We use residential reentry centers (RRCs) . . . to place inmates in the community prior to their release from custody in order to help them adjust to life in the community and find suitable post-release employment"). *See generally* RICHARD P. SEITER, ET AL., NAT'L INST. OF LAW ENFORCEMENT & CRIMINAL JUSTICE, HALFWAY HOUSES: NATIONAL EVALUATION PROGRAM PHASE I SUMMARY REPORT (1977); *see also* U.S. DEP'T OF JUSTICE, FED. BUREAU OF PRISONS, ABOUT THE FEDERAL BUREAU OF PRISONS (2001), available at [http://www.hawaii.edu/hivandais/About\\_the\\_Federal\\_Bureau\\_of\\_Prisons.pdf](http://www.hawaii.edu/hivandais/About_the_Federal_Bureau_of_Prisons.pdf) ("The Bureau places most inmates in community corrections centers (halfway houses) prior to their release from custody in order to help them adjust to life in the community and find suitable post-release employment.").

353. COMM'N ON EFFECTIVE CRIMINAL SANCTIONS, AM. BAR ASS'N, SECOND CHANCES IN THE CRIMINAL JUSTICE SYSTEM: ALTERNATIVES TO INCARCERATION AND REENTRY STRATEGIES 27 (2007).

to victimize others. Time spent in a halfway house gives inmates the opportunity to reconnect with family and to restore relationships.<sup>354</sup> Inmates placed directly in halfway houses have the opportunity to remain connected with family without being subject to the negative impact of being incarcerated in a traditional penal facility.<sup>355</sup> Thus, an increase in the maximum length of time that an inmate can be placed in a halfway house is more likely to provide the inmate with a greater opportunity to be successful upon reentry.

In preparing inmates for release, reentry programming accomplishes two related goals. First, the inmate must undergo a transition process of de-prisonization or de-institutionalization.<sup>356</sup> In other words, it is necessary for the inmate to move beyond the psychology of survival associated with being incarcerated where every move is constricted. Second, the halfway house must assist the inmate in acquiring a skill set that may have never existed or that atrophied while he was incarcerated. By increasing the length of time that an inmate can spend in a halfway house and not retaining the Bureau of Prisons' 2005 Rule interpretation, Congress recognized that a longer placement is useful and integral to improving an inmate's reentry prospects. It follows that Congress did not contemplate that the Bureau of Prisons would create a policy to limit placement, particularly in light of the fact that neither the 2002 Policy nor the 2005 Rule was affirmed. Congress expressly selected a time limit that was twice as long as that provided in the Bureau of Prisons' policy.<sup>357</sup> Moreover, the Second Chance Act cleared up confusion surrounding the numerous changes to the Bureau of Prisons' placement policy.<sup>358</sup> In the Congressional Record, the importance of reentry and the reduction of recidivism are repeatedly referenced.<sup>359</sup> This language makes it clear that Congress

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354. Damian J. Martinez & Johanna Christian, *The Familial Relationships of Former Prisoners: Examining the Link between Residence and Informal Support Mechanisms*, 38 J. OF CONTEMP. ETHNOGRAPHY 201, 205 (2009).

355. Borges, *supra* note 31, at 142 ("Now, the Bureau of Prisons has been ordered by the Justice Department not to accommodate judicial recommendations. As a result, non-violent offenders will be sent to prisons where they will be placed with hardened criminals.").

356. Much has been written about prison culture and that the tools necessary to survive while incarcerated are antithetical to free society. See, e.g., LYNN S. BRANHAM, *THE LAW AND POLICY OF SENTENCING AND CORRECTIONS: IN A NUTSHELL* 220 (8th ed. 2010) ("During what is known as the 'prisonization process,' prisoners . . . become highly dependent on others to make choices for them, leaving them ill-equipped to initiate the steps that will help them turn their lives around when they return to their communities.").

357. See FED. BUREAU OF PRISONS, PROGRAM STATEMENT 7310.04, *supra* note 15 (interpreting 18 U.S.C. § 3624(c) (2010)).

358. See *supra* Part II.

359. See 150 CONG. REC. 10717 (2004) (statement of Sen. Biden); 153 CONG. REC. 4430 (2007) (statement of Sen. Kennedy); 153 CONG. REC. 5691 (2007) (statement of Congressman Davis); 153 CONG. REC. 8280 (2007) (statement of Congressman Davis); 153 CONG. REC. 1644 (2007) (statement of Congressman Rangel); 153 CONG. REC. 12717

sought to provide a holistic approach to reentry that benefits the individual offender, the children and family of offenders, and the community at large.<sup>360</sup> The extraordinary justification exception rule is in direct opposition to Congress' intended purpose.<sup>361</sup>

### 3. Failure to Respond to Relevant Arguments or Comments

A reviewing court seeking to determine whether an agency's interpretation is reasonable will look at whether the agency's actions are responsive to relevant arguments or comments.<sup>362</sup> In accord with the directive in the Second Chance Act, the Bureau of Prisons promulgated an interim rule, which it submitted for public notice and comment.<sup>363</sup> The public comments contended that a six-month placement was not enough time for an inmate to readjust to law-abiding society and thus be successful upon reentry back into society.<sup>364</sup> The comments requested that the Bureau of Prisons reconsider and change the rule before it became final. Various stakeholders, including inmates, the families of inmates, and organizations,<sup>365</sup> requested a rule that provided for longer halfway house placements.<sup>366</sup> Of the more than one hundred entries, not a single comment supported the presumptive six-month placement absent an extraordinary justification.<sup>367</sup>

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(2007) (statement of Congressman Jackson-Lee) (2007). *But see* 153 CONG. REC. 5283 (2007) (statement of Congressman Gohmert).

360. Second Chance Act of 2007, Pub. L. No. 110-199, 122 Stat. 657 (2008) (codified in scattered sections of 18 and 42 U.S.C.).

361. *Federal Bureau of Prisons Oversight Hearing: The Bureau of Prisons Should Fully Implement Ameliorative Statutes to Prevent Wasted Resources, Dangerous Overcrowding, and Needless Over-Incarceration Before the Subcomm. on Crime, Terrorism, and Homeland Sec. of the H.R. Comm. On the Judiciary*, 111th Cong. (2009) (statement of Stephen R. Sady, Chief Deputy Fed. Pub. Defender for the Dist. of Or.).

362. A GUIDE TO JUDICIAL AND POLITICAL REVIEW OF FEDERAL AGENCIES, *supra* note 213, at 191 ("An agency decision will be set aside if the agency failed to consider submitted arguments, or respond to relevant and significant comments, made by the participants in the proceeding that gave rise to the agency action.").

363. 73 C.F.R. § 62440-01 (2008).

364. Comments in BOP Docket No. 1151-I, Interim Rule Change on Pre-Release Community Confinement, REGULATIONS.GOV (Feb. 11, 2011, 4:15 PM), <http://www.regulations.gov/#!docketDetail%3Bdct=FR+PR+N+O+SR+PS%3Bbrpp=10%3Bs o=DESC%3Bsb=postedDate%3Bpo=0%3BD=BOP-2009-0005>.

365. *Id.* The organizations that submitted comments in opposition to the rule were: the American Bar Association; the Federal Public Defender, Western District of Washington; the National Association of Criminal Defense Lawyers; Families Against Mandatory Minimums; the American Legislative Exchange Council; Prison Fellowship; and Justice & Mercy, Inc.

366. *Id.*

367. *Id.*

Although the information that was submitted appears to be anecdotal and not supported by evidence, the same can be said of the Bureau of Prisons' reliance upon agency experience as the basis for the rule. Each offered its opinion that the extraordinary justification exception rule was flawed because it failed to provide an adequate amount of time, meaning that the rule was not individually based. The public notice and comment period offers the Bureau of Prisons ample opportunity to respond to each comment and demonstrate its reasoning behind the promulgation of the rule. However, the Bureau of Prisons has not responded to the comments.<sup>368</sup> This lack of attention and failure to address the public comments is a factor that courts should consider in evaluating the reasonableness of the actions of the Bureau of Prisons.<sup>369</sup> The remedy for failing to answer the public comments has been to remand to the agency for "further proceedings."<sup>370</sup> The Bureau of Prisons' rule also ignores relevant arguments about the importance of halfway house placements.

The Second Chance Act is not a run-of-the-mill piece of legislation. Each of the last three presidents has addressed reentry.<sup>371</sup> The legislation has survived three Congresses.<sup>372</sup> Eventually, it was passed as a bipartisan legislative effort with the express purpose of responding to the growing concerns about the increase in the number of inmates exiting correctional facilities annually, and the increase in the cumulative number of former inmates in communities.<sup>373</sup> Congress was well aware that practices with

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368. The Bureau of Prisons' last action was the Proposed Rule on October 21, 2008 requesting comments. See 73 Fed. Reg. § 62440-01 (2008).

369. Merrick B. Garland, *Deregulation and Judicial Review*, 98 HARV. L. REV. 505, 509 (1985) ("[A] host of other now-familiar elements also became part of the hard look: an agency had to demonstrate that it had responded to significant points made during the public comment period, had examined all relevant factors, and had considered significant alternatives to the course of action ultimately chosen."). See *Home Box Office, Inc. v. FCC*, 567 F.2d 9, 35 (D.C. Cir. 1977) (requiring agency to respond to significant public comments).

370. David S. Rubenstein, "Relative Checks": *Towards Optimal Control of Administrative Power*, 51 WM. & MARY L. REV. 2169, 2238-39 (2010) ("The deleterious effects of a judicial substitution of judgment for that of the agency under hard-look review may be partially offset by the remedy chosen by the court. Rather than overturn an agency policy that it finds inadequate, courts may simply remand the matter to the agency for further proceedings. This approach seems especially appropriate when the agency's failure under the hard-look standard was its failure to adequately consider public comments or to adequately explain why it chose the policy it did.").

371. See Herckis & Seeger, *supra* note 9; Thompson, *supra* note 10, at 260; President George W. Bush, Address Before a Joint Session of the Congress on the State of the Union (Jan. 20, 2004), available at [http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=2004\\_presidential\\_documents&docid=pd26ja04\\_txt-10](http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=2004_presidential_documents&docid=pd26ja04_txt-10); Larry M. Fehr, *Reentry Matters*, CORRECTIONS TODAY, Dec. 2009, at 6 (discussing President Obama's funding for reentry).

372. See Herckis & Seeger, *supra* note 9; Thompson, *supra* note 10, at 260.

373. Clear, Waring & Scully, *supra* note 8, at ch. 7; TRAVIS, *supra* note 96, at ch. 11 (discussing the impact of mass incarceration on community life); TODD R. CLEAR,

respect to reentry were ineffective. Therefore, Congress expressly increased the length of time that an inmate was eligible to spend in a halfway house.<sup>374</sup>

Halfway houses, which are valuable resources for reentry, are structured, yet less restrictive than prison settings.<sup>375</sup> Inmates are able to transition gradually from incarceration back to society.<sup>376</sup> These facilities reduce the burden and stress associated with that transition, thereby allowing inmates to readjust, not only to living freely in society, but also to performing basic and necessary societal functions, such as maintaining employment and paying rent and other bills.<sup>377</sup> Moreover, halfway houses provide an in-house support network for the full range of obstacles that offenders may face upon release, including finding suitable and steady employment, and providing counseling for substance abuse and mental health issues. Unlike traditional correctional facilities, halfway houses are designed to house inmates whose release dates are near and thus mentally prepared for reentry. As already discussed, halfway houses also benefit the inmate's family and the community at large.

Halfway houses allow inmates and families the opportunity to reconnect and to reestablish interpersonal relationships that may have been impeded or severed outright due to the offender's incarceration. Because of institutional space limitations, security designations, or other requirements, inmates are often housed in facilities that are far from their communities and their families. Due to the distance and travel costs associated with visitation, including transportation, housing, and food, families

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IMPRISONING COMMUNITIES: HOW MASS INCARCERATION MAKES DISADVANTAGED NEIGHBORHOODS WORSE ch. 4 (2007) (discussing the concentration and impact of the formerly imprisoned in certain communities).

374. 18 U.S.C. § 3624(c) (2010).

375. See Borges, *supra* note 31, at 201 ("Halfway houses and community confinement centers provide an effective alternative to prison for white-collar offenders because they serve as a punitive sanction for offenders serving a short term of imprisonment. Furthermore, confinement centers make the transition back into the community easier for offenders by allowing them to participate in work-release programs, community activities, treatment, and maintain ties to family members, including children or ill parents.").

376. *Id.* at 142 ("Moreover, halfway houses have played a small, but important, role in helping ex-offenders reintegrate into society.").

377. Roberts, *supra* note 31, at 56 ("While in CCCs, inmates prepare for release by participating in specialized training programs stressing family and work adjustment, drug treatment, and relapse prevention strategies and by securing post-release employment and living accommodations. Community volunteers provide support in helping CCC residents successfully reintegrate into the community."); see Borges, *supra* note 31, at 203 ("[I]t is reasonable to conclude that halfway houses, offering work training, education, treatment, employment, and connections to family ties for offenders, are better able to rehabilitate and reintegrate the offender back into the community.").

are often limited in their interactions with inmates.<sup>378</sup> Halfway houses provide a transitional space where inmates and families can become reacquainted with each other without the immediate pressures associated with sharing the same living environment.

The Bureau of Prisons previously interpreted §§ 3621(b) and 3624(c) to allow early transfers or direct judicial placements into halfway houses.<sup>379</sup> The Bureau of Prisons has expressly stated that such facilities serve an important function in reducing recidivism, particularly for inmates who have “limited resources.”<sup>380</sup> Halfway houses, according to the Bureau of Prisons serve as an “excellent transitional environment” for inmates moving from more secure correctional environments to living free in society.<sup>381</sup> In acknowledging the important function that halfway houses serve,<sup>382</sup> the Bureau of Prisons remarked that eligible inmates should be released into the community through such a transitional stage rather than directly into the community.<sup>383</sup> While the designation of whether a halfway house was a place of imprisonment was contested, it

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378. Stephanie S. Franklin, *A Practitioner's Account of the Impact of the Adoption and Safe Families Act (ASFA) on Incarcerated Parents and Their Families*, in CIVIL PENALTIES, SOCIAL CONSEQUENCES 102 (Christopher Mele and Teresa A. Miller eds., 2005).

379. Borges, *supra* note 31, at 174 (“Under the former policy, the Bureau of Prisons had the authority pursuant to 18 U.S.C. § 3621(b) to place low-level, non-violent offenders in community confinement centers or halfway houses. Section 3621(b) gives the Bureau of Prisons the sole authority to determine the placement of federal offenders sentenced by federal judges, whether it is to prison or a halfway house . . . Under the old policy, federal judges had the ability to recommend, when appropriate, that non-violent offenders serve their short terms of imprisonment in community confinement centers rather than prisons. This practice was routinely honored. Thus, by its own initiative or by judicial recommendation, the Bureau of Prisons had the authority under its former policy to send low-level, non-violent offenders to community confinement centers.”).

380. FED. BUREAU OF PRISONS, PROGRAM STATEMENT 7310.04, *supra* note 15 (“Participating in community-based transitional services may reduce the likelihood of an inmate with limited resources from recidivating, whereas an inmate who is released directly from the institution to the community may return to a criminal lifestyle.”).

381. *Id.*

382. The Bureau of Prisons pioneered the way by using halfway houses early in its history as an effective tool. Roberts, *supra* note 31, at 55 (“The [Bureau of Prisons] was a key player in the development of community corrections. In 1960, community corrections was in its infancy. The three halfway houses that then existed in the United States were operated by religious organizations to provide shelter for recently released ex-prisoners who had nowhere else to live.”); PAUL W. KEVE, PRISONS AND THE AMERICAN CONSCIENCE: A HISTORY OF U.S. FEDERAL CORRECTIONS 216 (1991) (In 1961 after his appointment as Attorney General, Robert Kennedy implemented a “project to inaugurate prerelease guidance centers, the Bureau’s first move into the use of halfway houses.”); ESCAPING PRISON MYTHS: SELECTED TOPICS IN THE HISTORY OF FEDERAL CORRECTIONS 13, 15, 19 (John W. Roberts ed., 1994) (discussing the expansion and increased usage of halfway houses at different points in time).

383. FED. BUREAU OF PRISONS, PROGRAM STATEMENT 7310.04, *supra* note 15.



has been determined that such facilities are places of imprisonment.<sup>384</sup> Halfway houses are more cost-effective than traditional penal facilities, thus benefitting the entire community financially.<sup>385</sup> Although the Bureau of Prisons has identified such benefits, it continues to promulgate the six-month rule with extraordinary justification exception rule citing agency experience as the reason. After an appropriate assessment, the Bureau of Prisons may come to the conclusion that a six-month length of stay is an appropriate amount of time for an inmate to spend in a halfway house in order to successfully reenter society.<sup>386</sup> However, the Bureau of Prisons cannot fail to engage in an individualized assessment, which Congress has explicitly stated must occur.<sup>387</sup>

In 2005, the appellate and district courts differed as to whether the Bureau of Prisons' categorical exercise of discretion was proper.<sup>388</sup> Unlike the current rule, the issue of whether the Bureau of Prisons was entitled to engage in a categorical exercise of discretion was left unresolved because the passage of the Second Chance Act mooted the question. The question, however, has been resurrected and is ripe for judicial review. "It's déjà vu all over again."<sup>389</sup> This time, however, the courts need to respond with a definitive answer. Unfortunately, such a definitive answer is unlikely to be forthcoming.

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384. OLC Memo, *supra* note 4, at \*5 ("In addition, consistent with the federal courts of appeals' reading of section 5C1.1 . . . we do not believe that a community corrections center or halfway house is a 'place of . . . imprisonment' within the ordinary meaning of that phrase . . . [R]esidents of a community corrections center or halfway house, although still in federal custody, are generally not confined to the facility throughout the day but are instead able to pursue outside employment, training, and education."). Cf. *Goldings v. Winn*, 383 F.3d 17, 26 n.9 (1st Cir. 2004) ("[T]he OLC itself previously recognized that any correctional facility, including a community correctional facility, may be a place of imprisonment pursuant to the plain meaning of § 3621(b): There is . . . no statutory basis in section 3621(b) for distinguishing between residential community facilities and secure facilities . . . [T]he subsequent deletion of the definition of 'facility' further undermines the argument that Congress intended to distinguish between residential community facilities and other kinds of facilities.").

385. See *Iacoboni v. U.S.*, 251 F.Supp. 2d 1015 (D. Mass. 2003).

386. I would also disagree with the Bureau of Prisons' assessment. If the Bureau of Prisons' placement of six months or less had been effective then the recidivism rates would not have been as high within the first year or first three years of release. While the high recidivism rates cannot be full attributed to placing inmates in halfway houses for a maximum of only six months, it begs the question why Congress expanded the time limit to twelve months and why during the public and notice comment period opponents recommended twelve-month placement.

387. S. REP. NO. 98-225, at 142 (1983), *reprinted in* 1984 U.S.C.C.A.N. 3182, 3325 ("After considering these factors, the Bureau of Prisons may designate the place of imprisonment in an appropriate type of facility, or may transfer the offender to another appropriate facility."). See also *supra* Part II.A.1 (discussing the language in 18 U.S.C. § 3621(b) (2010) that indicates that Congress requires this assessment to occur).

388. See *infra* Part III.

389. BERRA, *supra* note 2.

The courts have consistently relied upon two doctrines to deny petitioners judicial access: failure to exhaust administrative remedies<sup>390</sup> and mootness<sup>391</sup> (although there are exceptions to both).<sup>392</sup> In light of what is at stake—decreasing recidivism and increasing public safety—the federal courts should relax their adherence to the failure to exhaust an administrative remedy requirement and mootness doctrine.

### III. DOCTRINAL OBSTACLES TO JUDICIAL REVIEW OF PLACEMENT POLICY

Courts have routinely denied inmate petitions seeking direct judicial review of the Bureau of Prisons' placement policy either because of the inmate's failure to exhaust administrative remedies or because the inmate's case is moot. Consequently, these doctrinal constraints are preventing a comprehensive review of the Bureau of Prisons' placement policy, and thus preventing inmates from possibly receiving longer halfway house placements.

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390. A sample of the petitions that have been denied because of the inmate's failure to exhaust administrative remedies: *Torres v. Martinez*, No. 3:09cv1070, 2009 WL 2487093, at \*4 (M.D. Pa. Aug. 12, 2009); *Sawyer v. Cozza-Rhodes*, No. 09-1017 JNE/AJB, 2009 WL 2255766, at \*2 (D. Minn. July 28, 2009); *Breazeale v. Schultz*, No. 09-2118, 2009 WL 1438236, at \*3 (D. N.J. May 19, 2009) ("Because the face of the Petition shows that Petitioner failed to exhaust administrative remedies and does not show that Petitioner's failure to pursue administrative relief should be excused, this Court will dismiss the [petition] without prejudice for failure to exhaust available administrative remedies."); *Wilson v. Keefer*, No. 08-1961, 2009 WL 1230020, at \*3 (W.D. La. May 5, 2009); *Johnson v. Hogsten*, No. 6:09-82-GFVT, 2009 WL 1010627, at \*2 (E.D. Ky. Apr. 15, 2009); *Searcy v. Stansberry*, No. 3:08CV50, 2009 WL 424344, at \*2 (E.D. Va. Feb. 19, 2009); *D'Apice v. Woodring*, No. CV 08-1526-MMM, 2009 WL 412111, at \*2 (C.D. Cal. Feb. 12, 2009); *Kennedy v. Berkebile*, No. 3:08-CV-2067-M, 2009 WL 151207, at \*2 (N.D. Tex. Jan. 20, 2009); *Dyer v. Mukasey*, No. 08 C 6404, 2008 WL 5156111, at \*2 (N.D. Ill. Dec. 8, 2008).

391. *Stewart v. Gonzales*, No. 1:07-00231, 2009 WL 669427, at \*3 (S.D. W. Va. Mar. 10, 2009) (finding petition is moot because of release from custody); *Pierce v. Nelson*, No. 1:07-00680, 2009 WL 261466, at \*2 (S.D. W. Va. Feb. 4, 2009) (finding petition is moot because of release from custody); *Ashburn v. Eichenlaub*, No. 07-13040, 2008 WL 5244413, at \*2 (E.D. Mich. Dec. 16, 2008) (finding petition is moot because petition challenges 2005 Rule); *Bell v. Berkebile*, No. 3:08-CV-0011-M ECF, 2008 WL 5100118, at \*2 (N.D. Tex. Dec. 2, 2008) (finding petition is moot because petition challenges 2005 Rule); *Keys v. Outlaw*, No. 2:07CV00137 JTR, 2008 WL 3062935, at \*1 (E.D. Ark. Aug. 1, 2008) (finding petition is moot because of transfer); *Motz v. Zuercher*, No. 08-cv-1062, 2008 WL 4414511, at \*1 (C.D. Ill. Sept. 22, 2008) (finding petition is moot because of release from custody).

392. *Fournier v. Zickefoose*, 620 F. Supp. 2d 313, 317 (2009) ("Although the court is well-aware that exhaustion is generally required before an action may be brought under section 2241, given the circumstances of this case—including . . . the obvious urgency of her Application and the near certainty that forcing her to pursue administrative remedies will render this case moot—the court excuses Fournier's failure to exhaust administrative remedies."); *Snyder v. Angelini*, No. 07-CV-3073, 2008 WL 4773142, at \*3 (E.D.N.Y. Oct. 27, 2008). See *infra* Parts III.A & III.B.

Inmates have invoked the futility exception, which allows a petitioner to bypass the administrative remedy process when pursuing judicial review.<sup>393</sup> Courts have overwhelmingly rejected this exception.<sup>394</sup> The Director of the Bureau of Prisons and other officials have stated repeatedly that a six-month placement is sufficient.<sup>395</sup> Given these official statements, legal action is inevitable.

Inmates who are eligible for halfway house placement will consistently expect the longest placement that is statutorily available. The Bureau of Prisons, on the other hand, is not convinced that placements in excess of six months are necessary, except for “extraordinary justifications.” Importantly, the Bureau of Prisons repeatedly has rejected attempts by prisoners to invoke the extraordinary justification exception.<sup>396</sup> As neither party is likely to change its opinion, inmates will continue to file petitions challenging the placement decisions and the time lost awaiting an admin-

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393. The court balances the individual’s interest with the procedural exhaustion requirement. *McCarthy v. Madigan*, 503 U.S. 140, 146 (1992) (“[A]dministrative remedies need not be pursued if the litigant’s interests in immediate judicial review outweigh the government’s interest in the efficacy or administrative autonomy that the exhaustion doctrine is designed to further.”).

394. See *supra* note 390 for examples of courts denying the futility exception.

395. See *Regional Hearing on the State of Federal Sentencing*, *supra* note 307, at 9–10 (statement of Harley G. Lappin, Dir., Fed. Bureau of Prisons) (“[T]he Bureau of Prisons rarely uses RRCs for direct court commitments and rarely transfers inmates to RRCs for prerelease services for more than 6 months . . . most releasing offenders receive the necessary transitional assistance in three to four months at an RRC.”); *U.S. Dept. of Justice Before the H.R. Comm. on the Judiciary, Subcomm. on Crime, Terrorism, and Homeland Security: Federal Bureau of Prisons Oversight* (July 21, 2009) (statement of Harley G. Lappin, Dir., Fed. Bureau of Prisons) (“The use of residential reentry centers is a topic of significant interest, especially with the enactment of the Second Chance Act. We understand the interest in placing inmates in halfway houses for periods of time longer than the current average of 4 months.”) [hereinafter Lappin statement of July 21, 2009]; *Symposium on Alternatives to Incarceration*, *supra* note 307, at 272 (“BOP studies indicate that an inmate can receive the full benefit of a Residential Reentry Center after only six months.”); *Id.* at 283 (statement of Jerry Vroegh, Adm’r, Cmty Corr. and Det. Services Branch, Fed. Bureau of Prisons).

396. *Hayes v. Grayer*, No. 1:09-CV-2501-RWS, 2009 WL 4906864, at \*8 (N.D. Ga. Dec. 17, 2009) (affirming the Bureau of Prisons’ decision that no extraordinary justification existed); *Esters v. Jett*, No. 09-1667 (MJD/AJB), 2009 WL 3417900, at \*4 (D. Minn. Oct. 21, 2009) (“Based upon the criteria considered by the unit team, along with the absence of extraordinary or compelling circumstances to justify a longer RRC placement, a maximum halfway house release of 180 days was recommended.”); *Daraio v. Lappin*, No. 3:08CV1812(MRK), 2009 WL 303995, at \*7 (D. Conn. Feb. 9, 2009) (in which petitioner offered several extraordinary justifications for a longer placement, each of which was denied); *Johnson v. Fed. Bureau of Prisons*, No. 07-3292-RDR, 2008 WL 2648996, at \*3 (D. Kan. June 27, 2008) (in which petitioner raised an extraordinary justification exception claim, but the court denied for failure to exhaust administrative remedies); *Fisher v. Morrison*, No. 06-2775, 2007 WL 4441180, at \*1 (8th Cir. Dec. 20, 2007) (declining to hear appeal regarding extraordinary justification exception claim).

istrative decision will continue to diminish the amount of time that inmates would be able to spend in a halfway house.<sup>397</sup>

Courts have continued to adhere to the exhaustion doctrine in the face of statements made by the Bureau of Prisons' officials<sup>398</sup> and existing placement data<sup>399</sup> that the pursuit of an administrative remedy (i.e., receiving a longer placement after being reviewed) would be useless.<sup>400</sup>

Under the mootness doctrine, federal courts are technically constrained from hearing cases in which they can no longer provide the remedy that is sought. In the absence of a case or controversy, the petitioner's case is dismissed.<sup>401</sup> There are exceptions to this doctrine,<sup>402</sup> such as when an issue is "capable of repetition, yet it evades review" because the

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397. Strong v. Schultz, 599 F. Supp. 2d 556, 561 (D.N.J. 2009) ("This Court notes that Strong is currently scheduled to be placed in a CCC for the final six months of his sentence . . . . Given that it took five months to exhaust administrative remedies the first time around, dismissal of the Petition as unexhausted would effectively moot Petitioner's § 2241 claim through no fault of his own . . . . [T]he purposes of exhaustion would not be served by requiring a second round of exhaustion, since Strong is challenging the validity of the BOP's April 14, 2008, guidance, not its application. This Court will therefore excuse the failure to exhaust administrative remedies."; *Id.*; at 563 n.4 ("Because Strong only has nine months left on his sentence, the BOP shall consider his designation to a CCC for the remainder of his term of incarceration."); Padilla v. Wiley, No. 09-cv-01111-BNB, 2009 WL 2447394, at \*3 (D. Colo. Aug. 6, 2009). *But see* Wolff v. Cruz, No. 09-CV-0437 PJS/AJB, 2009 WL 2143692, at \*3-4 (D. Minn. July 14, 2009) ("[T]he prisoner's calculation as to the amount of time required to complete the three-tier administrative remedy process is based upon his own use of the entire available time to submit successive appeals, along with unsupported assumptions that the warden, the BOP Regional Director, and the Central Office would each take the maximum amount of time to render their respective decisions, and that such decisions would be adverse to the prisoner . . . . [T]he court concludes that the petitioner is not entitled to the benefit of the substantially arbitrary presumptions upon which he relies with regard to either the time for appeals or the likelihood of success, and the futility argument therefore fails.").

398. See *supra* note 364 and accompanying text.

399. Freedom of Information Act (FOIA), 5 U.S.C. § 552 (2007), Request No. 2010-00330 from S. David Mitchell to Wanda M. Hunt (Oct. 14, 2009). In response to the author's request for information regarding the length of time that inmates are placed in a Residential Re-entry Center the Bureau of Prisons provided incomplete data showing that two percent of prisoners received placements longer than six months.

400. Some courts have proceeded to address the merits of a petition even though the petitioner has failed to exhaust the administrative remedies. See Lueth v. Beach, 498 F.3d 795, 797 n.3 (8th Cir. 2007) (stating that a court may address the merits of a petition despite alleged failure to exhaust administrative remedies because the "exhaustion prerequisite for filing a 28 U.S.C. § 2241 petition is judicially created, not jurisdictional"); Torres v. Martinez, No. 3:09cv1070, 2009 WL 2487093, at \*10 (M.D. Pa. Aug. 12, 2009) (addressing the merits with respect to halfway house placement).

401. See, e.g., Spencer v. Kemna, 523 U.S. 1 (1998); Raines v. Byrd, 521 U.S. 811 (1997); Flast v. Cohen, 392 U.S. 83 (1968).

402. One exception, the voluntary cessation of the challenged practice, is inapplicable and will not be discussed. City News & Novelty, Inc. v. City of Waukesha, 531 U.S. 278, 284 n.1 (2001); Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc., 528 U.S. 167, 189 (2000).

time between the conduct and judicial review is too short.<sup>403</sup> In other words, this exception allows a court to review a petition even though such review would technically be precluded. Another exception that has been recognized by state courts,<sup>404</sup> the public importance exception, also applies when an issue is significant and likely to recur.<sup>405</sup> Although the public importance exception has not been explicitly defined, it has been referred to as a “great” or “substantial” issue.<sup>406</sup> The specific issue of half-way house placement and general issue of reentry is of such significance<sup>407</sup> that federal courts should adopt this exception<sup>408</sup> and declare once and for

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403. See *Citizens United v. Fed. Election Comm’n*, 130 S. Ct. 876, 895 (2010); *Friends of the Earth, Inc.*, 528 U.S. 167; *Richardson v. Ramirez*, 418 U.S. 24 (1974); *S. Pac. Terminal Co. v. ICC*, 219 U.S. 498, 515 (1911).

404. See *Cinkus v. Village of Stickney Mun. Officers Electoral Bd.*, 886 N.E.2d 1011, 1017 (Ill. 2008) (“[O]ne exception to the mootness doctrine allows a court to resolve an otherwise moot issue if that issue involves a substantial public interest. The criteria for application of the public interest exception are: (1) the question presented is of a public nature; (2) an authoritative resolution of the question is desirable to guide public officers; and (3) the question is likely to recur.”); *Lucas v. Lakin*, 676 N.E.2d 637 (Ill. 1997); *In re A Minor*, 537 N.E.2d 292 (Ill. 1989). A clear showing of each criterion is necessary to bring a case within the public interest exception. *Bonaguro v. Cnty. Officers Electoral Bd.*, 634 N.E.2d 712 (Ill. 1994).

405. *Radazewski v. Cawley*, 639 N.E.2d 141 (Ill. 1994).

406. *In re Geraghty*, 343 A.2d 737, 738–39 (N.J. 1975) (“[W]e have often recognized that courts may hear and decide cases which are technically moot where issues of great public importance are involved.”); *People ex rel. Guggenheim v. Mucci*, 298 N.E.2d 109, 110 (N.Y. 1973) (“[A]n appeal should not be dismissed as moot if a question of general interest and substantial public importance is likely to recur.”).

407. See SABOL, WEST & COOPER, *supra* note 5; Fehr, *supra* note 58, at 5 (“Annually, the Bureau returns 45,000 federal inmates to our communities, a number that will continue to increase as the population grows.”).

408. William A. Fletcher, *The “Case or Controversy” Requirement in State Court Adjudication of Federal Questions*, 78 CAL. L. REV. 263, 300–01 (1990) (advocating for federal courts to adopt the public importance exception. “In my view, the article III mootness standard as presently formulated is too grudging. I would prefer that the Supreme Court forthrightly adopt the ‘continuing public importance’ exception that is virtually universal in state courts. In such cases, the state appellate court is deciding a matter that is of great and current concern to the state’s public officials, that was litigated and decided when the case was indisputably live, and in which the parties retain sufficient interest to argue the case in the appellate court. In such circumstances, it seems unlikely that the quality of adjudication by the state appellate court—or by the United States Supreme Court, for that matter—is so seriously threatened that the appeal must be considered nonjusticiable under article III. Indeed, the Supreme Court’s exception to article III mootness doctrine for matters that are ‘capable of repetition, yet evading review’ appears to be close to an open admission that this is so.”). *But see* Thomas R. Bender, *Rhode Island’s Public Importance Exception for Advisory Opinions: The Unconstitutional Exercise of a Non-Judicial Power*, 10 ROGER WILLIAMS U. L. REV. 123, 126, 157 (2004) (criticizing the public importance exception as inconsistent and “inappropriate” in the context of providing advisory opinions).

all whether the Bureau of Prisons' policy is impermissible.<sup>409</sup> The Bureau of Prisons' policy not only exceeds the bounds of its statutorily mandated discretion, but it also disregards Congress' intent to improve federal reentry. The Bureau of Prisons needs to amend its policy and not limit the placement of inmates in halfway houses to six months. Ideally, the Bureau of Prisons should return to its pre-2002 open transfer policy.<sup>410</sup>

If a petitioner can convince a court to review the case, he at least has a chance of prevailing and obtaining the sought after remedy of being placed in a halfway house for a longer period of time. The problem, however, is that courts are using two doctrines to block review: exhaustion<sup>411</sup> and mootness.

### A. Failure to Exhaust Administrative Remedies

An inmate who fails to exhaust the administrative process<sup>412</sup> will not be heard unless the court recognizes an exception that permits the inmate

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409. See John W. Roberts, *The Federal Bureau of Prisons: Its Mission, Its History and Its Partnership With Probation and Pretrial Services*, 61 FED. PROBATION 53, 54 (1997) ("For the first five decades of the BOP's existence, the number of prisons and the number of inmates remained fairly stable. From the early 1940s through the early 1980s, for example, the inmate population in the BOP's 25 to 30 facilities fluctuated within a narrow range of 17,000 to 25,000. By the mid-1980s, however, intensified prosecution of drug laws, the introduction of sentencing guidelines, and the discontinuation of federal parole created a period of unprecedented growth in the BOP."); FED. BUREAU OF PRISONS, U.S. DEPT. OF JUSTICE, ABOUT THE FEDERAL BUREAU OF PRISONS, *supra* note 352, at 3 ("The 1980's brought a significant increase in the number of Federal inmates—the result of Federal law enforcement efforts and new legislation that dramatically altered sentencing in the Federal criminal justice system. Most of the Bureau's growth since the mid-1980's has been the result of the Sentencing Reform Act of 1984 (Which established determinate sentencing, abolished parole, and reduced good time) and mandatory minimum sentences enacted in 1986, 1988, and 1990.").

410. See *supra* Part II.A.

411. Hall v. Fed. Bureau of Prisons, No. 09-3052-RDR, 2009 WL 2009007 (D. Kan. July 9, 2009) (holding that petitioner failed to exhaust administrative remedies); Johnson v. Fed. Bureau of Prisons, No. 07-3292-RDR, 2008 WL 2648996 (D. Kan. June 27, 2008); Snyder v. Angelini, No. 07-3073, 2008 WL 4773142, at \*3 (E.D.N.Y. Oct. 27, 2008) (noting that futility exception negates the petitioner's failure to exhaust administrative remedies); Johnson v. Hogsten, No. 6:09-82, 2009 WL 1010627, at \*2-3 (E.D. Ky. Apr. 15, 2009) (denying petition on the ground that the petitioner failed to exhaust administrative remedies and the futility exception was inapplicable); Leung v. U.S., No. 01 CR. 366(RCC), 2003 WL 3237637 (S.D.N.Y. Sept. 17, 2003).

412. See Darby v. Cisneros, 509 U.S. 137, 144 (1993). The exhaustion of administrative remedies is a judicial doctrine that requires an individual to submit a grievance to the agency's administrative remedy process before seeking relief from the courts. The purpose of the requirement is to recognize that the agency has been delegated primary responsibility for enacting Congressional programs, to allow the agency an opportunity to remedy the grievance without judicial interference, and to provide a record if judicial review is warranted.

to circumvent the administrative process.<sup>413</sup> The purpose of the exhaustion doctrine is to provide the administrative agency the opportunity to redress a party's grievance without judicial interference.<sup>414</sup> The exhaustion doctrine has several exceptions<sup>415</sup> that can be invoked to relieve the peti-

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413. *Esters v. Jett*, No. 09-1667 (MJD/AJB), 2009 WL 3417900, at \*3 (D. Minn. Oct. 21, 2009) ("The BOP has established a three-tiered administrative remedy program to address prisoner concerns relating to any aspects of confinement. The first tier of the process requires that an inmate initially seek informal resolution of the grievance and, if there is no informal resolution he must present the complaint to the warden of the facility of confinement. Thereafter, at the second tier, an unsatisfactory response from the warden may be appealed to the BOP Regional Director, and finally, the response of the Regional Director may be appealed to the Central Office of the BOP at the third tier. A prisoner's complaint has been exhausted, and is thereby subject to district court review, upon receipt of the Central Office response.") (citations omitted); *Williams v. Outlaw*, No. 2:09CV00075 BSM, 2009 WL 5184329, at \*6 (E.D. Ark. Dec. 22, 2009); *Jones v. Zenk*, 495 F. Supp. 2d 1289 (N.D. Ga. 2007); *Kennedy v. Berkebile*, No. 3:08-CV-2067-M, 2009 WL 151207, at \*2 (N.D. Tex. Jan. 20, 2009). See also FED. BUREAU OF PRISONS, U.S. DEPT. OF JUSTICE, LEGAL RESOURCE GUIDE TO THE FEDERAL BUREAU OF PRISONS 34-35 (2008), [http://www.bop.gov/news/PDFs/legal\\_guide.pdf](http://www.bop.gov/news/PDFs/legal_guide.pdf) (detailing the Administrative Remedy Program and the time limits).

414. RICHARD J. PIERCE, JR., SIDNEY A. SHAPIRO & PAUL R. VERKUIL, *ADMINISTRATIVE LAW AND PROCESS* 192-93 (3d ed. 1999) ("First . . . the legislature creates an agency for the purpose of applying a statutory scheme to particular factual situations. The exhaustion doctrine permits the agency to perform this function, including in particular the opportunity for the agency to apply its expertise and to exercise the discretion granted it by the legislature. Second, it is more efficient to permit the administrative process to proceed uninterrupted and to subject the results of the process to judicial review only at the conclusion of the process. Three, agencies are not part of the judicial branch; they are autonomous entities created by the legislature to perform a particular function. The exhaustion doctrine protects the agency autonomy. Fourth, judicial review of agency action can be hindered by failure to exhaust administrative remedies because the agency may not have an adequate opportunity to assemble and analyze the facts and to explain the basis for its action. Fifth, the exhaustion requirement reduces court appeals by providing the agency additional opportunities to correct its prior errors. Sixth, allowing some parties to obtain court review without first exhausting administrative remedies may reduce the agency's effectiveness by encouraging others to circumvent its procedures and by rendering the agency's enforcement efforts more complicated and more expensive."). See *McCarthy v. Madigan*, 503 U.S. 140, 145 (1992) ("Exhaustion is required because it serves the twin purposes of protecting administrative agency authority and promoting judicial efficiency."); *McKart v. United States*, 395 U.S. 185, 193 (1969) ("A primary purpose is . . . the avoidance of premature interruption of the administrative process . . . . The courts ordinarily should not interfere with an agency until it has completed its action, or else has clearly exceeded its jurisdiction."); *Myers v. Bethlehem Shipbuilding Corp.*, 303 U.S. 41 (1938) (discussing the application of the exhaustion doctrine).

415. See Robert Layton & Ralph I. Fine, *The Draft and Exhaustion of Administrative Remedies*, 56 GEO. L.J. 315, 322-331 (1967-68); *McCarthy*, 503 U.S. at 146-48 ("This Court's precedents have recognized at least three broad sets of circumstances in which the interests of the individual weigh heavily against requiring administrative exhaustion. First, requiring resort to the administrative remedy may occasion undue prejudice to subsequent assertion of a court action . . . . Second, an administrative remedy may be inadequate 'because of some doubt as to whether the agency was empowered to grant effective relief

tioner of his duty to navigate the established administrative process prior to seeking judicial review. The exceptions that have previously been recognized are irreparable harm, reconsideration or administrative appeals, express or implied waiver, futility, manifest violation of constitutional rights, purely legal issue, procedural challenge, challenge of bias or prejudgment, exercise of judicial discretion, unreasonable delay,<sup>416</sup> and those expressly created by statute.<sup>417</sup>

An inmate challenging a Bureau of Prisons' action first submits an informal request to the institutional staff regarding the issue.<sup>418</sup> If that request is unsuccessful and the inmate is denied a longer placement, the inmate then submits a formal written request for an administrative remedy.<sup>419</sup> Upon receipt of such a request, the warden of that facility has twenty days in which to respond.<sup>420</sup> If that response is still unsatisfactory, the inmate is permitted to submit an appeal to the Regional Director within twenty days.<sup>421</sup> Following the submission of such an appeal, the Regional Director has thirty days in which to respond.<sup>422</sup> If the inmate is still dissatisfied, the inmate has thirty days to file an appeal with the Bureau of Prisons' General Counsel. Once the appeal is filed, the General Counsel has forty days to respond.<sup>423</sup> The administrative remedy program exists in order to allow the Bureau of Prisons to remedy the problem without judicial intervention and to establish an appropriate record for the court if judicial intervention is required.<sup>424</sup> Although the program is important, the Supreme Court has acknowledged that there are circumstances in which a failure to exhaust the administrative remedies is excusable.<sup>425</sup>

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... Third, an administrative remedy may be inadequate where the administrative body is shown to be biased or has otherwise predetermined the issue before it.") (quoting *Gibson v. Berryhill*, 411 U.S. 564, 575 (1973)). Embodied in the futility exception are two others that have been separated out and are applicable here but will be discussed in the context of the futility exception. They are a challenge of bias or prejudgment and unreasonable delay. *WRIGHT & KOCH, JR. supra* note 23, § 8398.

416. *Gibson v. Berryhill*, 411 U.S. 564 (1973); *Sw. Bell Tel. Co. v. FCC*, 138 F.3d 746 (8th Cir. 1998).

417. *WRIGHT & KOCH, JR. supra* note 23, § 8398.

418. 28 C.F.R. § 542.13 (2002).

419. *Id.* § 542.14.

420. *Id.* § 542.18.

421. *Id.* § 542.15.

422. *Id.* § 542.18.

423. See *id.* §§ 542.10-542.19; *Fournier v. Zickefoose*, 620 F. Supp. 2d 313, 316 (D. Conn. 2009) (detailing the Bureau of Prisons' Administrative Remedy Program); *Cooper v. Grondolsky*, No. 09-2970 (JBS), 2009 WL 2049168, at \*2 (D. N.J. July 8, 2009) (detailing the Bureau of Prisons' Administrative Remedy Program).

424. *McCarthy v. Madigan*, 503 U.S. 140, 144 (1992).

425. *Id.*



Of these exceptions, federal inmates have relied primarily upon two: futility and irreparable injury.<sup>426</sup> Neither has proved overwhelmingly successful. Curiously, inmates have not asserted the following exceptions, which may be more successful, to obtain judicial review: challenge of bias or prejudgment, unreasonable delay, and questions of law.

### 1. Futility: Adequacy of Remedy Versus Judicial Inevitability

In assessing whether the futility exception to the exhaustion requirement is applicable, courts have interpreted the exception differently. Some courts have focused on the “adequacy of the remedy,” finding that that the administrative agency must be able to provide the relief requested.<sup>427</sup> Others have focused on whether a judicial proceeding is inevitable.<sup>428</sup> Some courts that have denied the countless petitions challenging the Bureau of Prisons’ placement policies have focused on whether the Bureau of Prisons can provide an adequate remedy.<sup>429</sup> The courts’ focus, however, is misplaced. Rather than deciding whether an agency has the ability to provide a remedy, the court should be concerned with whether the agency’s policy is correct.

With regard to the Bureau of Prisons’ halfway house placement policy, at least one court has maintained that it would be a waste of time to follow through with the Bureau of Prisons’ administrative remedy because the agency has predetermined the outcome.<sup>430</sup>

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426. The exhaustion requirement in the Prison Litigation Reform Act, 42 U.S.C. § 1997e(a) (2010), mandates that prisoners complete the administrative review process before seeking a judicial remedy, Karen M. Blum, *Local Government Liability Under Section 1983*, 764 PLI/LIT 747, 821 (Oct. 25–26, 2007). Federal inmates challenging the Bureau of Prisons halfway house placement policy can submit an exception to the requirement as the numerous petitions challenging the new policies demonstrate.

427. *Johnson v. Dept. of Corr.*, 635 N.W.2d 487, 489 (Iowa Ct. App. 2001) (noting that the administrative code provided an adequate administrative remedy to the inmate seeking parole); *Moulton v. Napolitano*, 73 P.3d 637, 645 (Ariz. Ct. App. 2003) (focusing on the power of the administrative agency to provide relief and not the probability of providing such relief); *Neiman v. Yale Univ.*, 270 Conn. 244, 260 (2004) (noting that the possibility of an adverse decision does not constitute futility).

428. *Kish v. Cohn*, 756 A.2d 313 (Conn. App. Ct. 2000); 73 C.J.S. *Futility* § 91 (2010).

429. *Schlenkert v. Garcia*, No. 09-cv-01416-MSK, 2011 WL 116848, at \*1 (D. Colo. Jan. 13, 2011) (“Because Mr. Schlenkert is no longer in custody, it is impossible to grant him an earlier RRC placement. Put simply, because Mr. Schlenkert has already been released from custody, there is nothing for the Court to remedy.”); *Berry v. Sanders*, No. CV 08-1319-VBF (MAN), 2009 WL 789890, at \*3 (C.D. Cal. Mar. 20, 2009); *Eagle v. Garcia*, No. 09-cv-01293-WYD, 2010 WL 899939, at \*2 (D. Colo. Mar. 11, 2010).

430. *Ferguson v. Ashcroft*, 248 F. Supp. 2d 547, 563 (M.D. La. 2003).

The court finds that Ms. Ferguson need not exhaust administrative remedies that are mere apparitions. While the Government is correct that the exhaustion doctrine normally bars direct resort to the courts, that is not true where pursuing administrative remedies would be futile “because it is clear that the claim will be rejected.” Where an agency has adopted a new rule or policy and announced that it will follow that policy, especially where that policy has its origin above the Bureau’s General Counsel Office, it is pointless to require a complainant to follow the administrative procedure. The people who would review Ms. Ferguson’s claims in the Bureau have absolutely no power to alter her designation. The new ‘policy’ was based on an interpretation that was handed down from on high in the Department of Justice. Thus, an administrative appeal could only work to delay this matter.<sup>431</sup>

Federal inmates have claimed repeatedly that the Bureau of Prisons has pre-determined that six months in a halfway house is a satisfactory length of time for an inmate to be prepared for reentry.<sup>432</sup> The extraordinary justification exception rule has its origins in a 2002 policy that was recommended by the Office of Legal Counsel and supported by the Department of Justice.<sup>433</sup> It is pointless to require an inmate to comply with the Bureau of Prisons’ administrative remedy process.

The standard used to assess whether it would be futile to pursue the review process is “when it is clear beyond a reasonable doubt . . . that the agency will not provide the relief requested.”<sup>434</sup> An appeal is futile if the Bureau of Prisons “refuses to reconsider its decisions or procedures, or has stated a categorical rule to apply in a group of cases, or where further administrative review would result in a decision on the same issue by the same body.”<sup>435</sup> All of these are applicable with respect to an inmate seeking a longer halfway house placement. It is readily apparent that the Bureau of Prisons has no intention of changing its placement policy and transferring offenders to halfway houses for more than six months.

Under the extraordinary justification exception rule, the Bureau of Prisons has pre-determined how much time is satisfactory for each inmate. The increased “period of evaluation” merely reinforces the adopted policy and pays lip service to the intent of Congress in § 3621(b) to consider the five factors. Some inmates have been placed in halfway houses for more than six months, but the placement itself is not the proper focus for analysis. The Bureau of Prisons is not following the process set forth

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431. *Id.*

432. *See supra* note 395.

433. *See* Thompson Memo, *supra* note 45; OLC Memo, *supra* note 46.

434. *Weston v. Cassata*, 37 P.3d 469, 478 (Colo. App. 2001).

435. *Little v. City of Lawrenceville*, 528 S.E.2d 515, 518 (Ga. 2000).

by Congress, thereby forcing inmates to challenge the agency's placement decisions. By requiring exhaustion of the administrative remedy process, the courts are implicitly supporting the Bureau of Prisons' continued and willful disregard of the five factors in § 3621(b). The time spent navigating an administrative remedy process whose outcome is pre-determined wastes valuable time which could be devoted to preparing an inmate to reenter society. Even if an inmate manages to navigate the administrative remedy process and eventually prevails in court, the maximum amount of placement time will no longer be available. The Bureau of Prisons' data on halfway house placement underscore the futility of seeking redress under the administrative remedy process.

In response to a Freedom of Information Act request, the Bureau of Prisons provided the following data. Of the 8,945 inmates that were listed on the Bureau of Prisons' website in October 2009 as being placed in a halfway house, the Bureau of Prisons provided information on only 2,275 of them.<sup>436</sup> Of those prisoners, two percent, or fifty-six, inmates had received a halfway house placement in excess of six months.<sup>437</sup> The Bureau of Prisons provided no rationale for the unaccounted inmates. The Bureau of Prisons stated that the information pertaining to the extraordinary justification exception, the information needed to receive a halfway house stay in excess of six months, was not centralized but kept at each individual facility. There was no explanation as to why only fifty-six inmates had received longer placements.

One may posit that the Bureau of Prisons would argue that because approximately two percent of these inmates were placed in a halfway house for more than six months, the administrative review process works, and its actions are not contrary to its statutory mandate.<sup>438</sup> Thus, it is not futile to require an inmate to adhere to the administrative process. This argument is wide of the mark. The question is not whether the Bureau of Prisons can provide the remedy sought, i.e., a longer placement, but rather whether the exhaustion requirement is futile because the outcome has been predetermined. It is in that light that courts need to acknowledge the futility exception.

When the Bureau of Prisons adopted the 2002 Policy, the change limited the placement of inmates to a period of either the last ten percent of their sentence or six months, whichever was less.<sup>439</sup> Each subsequent change to the Bureau of Prisons' policy and each rule that has been adopted has reaffirmed the six-month limitation, with the Bureau of Pris-

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436. *Weekly Population Report*, FEDERAL BUREAU OF PRISONS (Oct. 9, 2009), [http://www.bop.gov/locations/weekly\\_report.jsp](http://www.bop.gov/locations/weekly_report.jsp). The Bureau of Prisons has not yet indicated what circumstances satisfy the extraordinary justification requirement.

437. Freedom of Information Act (FOIA) Request No. 2010-00330, *supra* note 399.

438. See *supra* note 400 and accompanying text.

439. See Cooksey & Erlewine Memo, *supra* note 17, at 2.

ons asserting different reasons for the policy's validity,<sup>440</sup> including prior erroneous statutory interpretation<sup>441</sup> or categorical exercise of discretion.<sup>442</sup> In addition, the Director of the Bureau of Prisons and other officials have reiterated that six months in a halfway house is enough time for an inmate to reenter society successfully.<sup>443</sup> If the Director has indicated that six months is a sufficient amount of time<sup>444</sup> and the Regional Directors must provide written approval of longer placements,<sup>445</sup> it stands to reason that the Bureau of Prisons' officials are more than likely to decline an administrative appeal challenging the placement determination. Hence, the futility exception has been satisfied.

Inmates have also asserted that the requirement to exhaust the administrative remedy results in an irreparable injury, but these assertions have not been met with success.

## 2. Irreparable Injury: Larger Than the Individual

Under the irreparable injury exception, the petitioner must demonstrate that "an award of damages at a later date will not adequately compensate the aggrieved party."<sup>446</sup> However, courts have narrowly construed this exception to prevent petitioners from claiming speculative injuries as a means to evade administrative review, which would supplant the agency's decision making with that of the courts. While that approach may be proper in other contexts, it is shortsighted when applied to halfway house placement, an important piece of the reentry puzzle.

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440. See *supra* Part II.B.1-3 (discussing the adoption of the policy which limited placement to six months based upon the OLC's determination that open transfer policy was illegal, and asserting a categorical exercise of discretion which continued to limit the placement to six months to insulate the 2005 Rule from challenges).

441. *Id.*

442. *Id.*

443. See *supra* note 307.

444. See Lappin statement of July 21, 2009, *supra* note 395, at 2 (citing *Symposium on Alternatives to Incarceration*, *supra* note 307, at 267). See also *Symposium on Alternatives to Incarceration*, *supra* note 307, at 272 ("BOP studies indicate that an inmate can receive the full benefit of a Residential Reentry Center after only six months.").

445. See *Strong v. Schultz*, 599 F.Supp. 2d 556, 562 (D.N.J. 2009) ("This Court finds that, by instructing staff that pre-release placement needs can usually be accommodated by a placement of six months or less and by denying staff the discretion to recommend a placement longer than six months (Without advance written approval from the Regional Director), the April 14, 2008, Memorandum is inconsistent with the Second Chance Act's amendments to § 3624(c)"); *Hayes v. Grayer*, No. 1:09-CV-2501-RWS, 2009 WL 4906864, at \*6 (N.D. Ga. Dec. 17, 2009) (citing *Strong*); *Torres v. Martinez*, No. 3:09cv1070, 2009 WL 2487093, at \*4 (M.D. Pa. Aug. 12 2009) (citing *Strong*); see also 28 C.F.R. §§ 570.20-22 (2008); Conley & Kenney Memo, *supra* note 14 (stating the proposition that approval is required); Bureau of Prisons, Program Statement 7310.04, *supra* note 15.

446. *Gutierrez v. Laredo Indep. Sch. Dist.*, 139 S.W.3d 363, 367 (Tex. App. 2004).

The Second Chance Act was passed specifically to reduce recidivism and to increase public safety.<sup>447</sup> Congress expressly increased the amount of time that an individual could be placed in a halfway house.<sup>448</sup> Congress also repeatedly stressed that, in order for reentry to be successful, it is necessary to provide offenders with housing, employment, medical care, drug treatment, and the opportunity to reunite with family.<sup>449</sup> Transitioning from a correctional facility to a free, law-abiding life requires more than a change of address; it requires the inmate to acquire new skills and a new attitude.<sup>450</sup> Halfway houses provide an inmate with the opportunity to make that transition. Moreover, the longer the period of transition, the more likely an inmate can build an employment record, acquire lost or never attained skills, reverse the effects of prisonization,<sup>451</sup> and positively reconnect with family.<sup>452</sup>

Apart from these two exceptions—futility and irreparable injury—that have been unsuccessful, there are other exceptions, such as questions of law, bias or predetermination, or unreasonable delay, that the courts could invoke to grant federal inmates judicial access without first having to exhaust the administrative remedy process.

### 3. Questions of Law: Additional Factors Considered

Under the question of law exception, a petitioner can avoid having to exhaust the administrative remedy “where the agency disregards a specific and unambiguous statutory . . . directive.”<sup>453</sup> By declaring that an inmate will be presumptively placed in a halfway house for six months absent an extraordinary justification is a question of law.

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447. Second Chance Act of 2007, Pub. L. No. 110-199, 122 Stat. 657 (2008) (codified in scattered sections of 18 and 42 U.S.C.).

448. Some may suggest that the expanded time limit was to end the debate once and for all as to the proper placement policy. Congress could have resolved the years of confusion by declaring six months as the limit to halfway house placement. Yet, it specifically increased the amount of time.

449. See *supra* note 447.

450. See *supra* note 348 and accompanying text.

451. See CLEMMER, *supra* note 351, at ch. 8; Stevens, *supra* note 351; Edwards, *supra* note 351.

452. See *supra* note 100 and accompanying text.

453. 73 C.J.S. *Questions of Law* § 93 (2010) (The exception in its totality reads as follows: “A failure to exhaust administrative remedies may be justified when the only or controlling question is one of law, or where the issue is one of facial validity or construction or interpretation of a statute or regulation. Similarly, the rule of exhaustion of remedies will not usually apply where the validity of the administrative remedy itself is challenged, or where the agency disregards a specific and unambiguous statutory, regulatory or constitutional directive.”). See *Ind. State Dep’t of Welfare, Medicaid Div. v. Stagner*, 410 N.E.2d 1348, 1353 (Ind. Ct. App. 1980); *State ex rel. Golemske v. White*, 362 A.2d 1354, 1358 (Conn. 1975).

Section 3624(c)(6) requires the Bureau of Prisons to act in a manner that is consistent with § 3621(b). The Bureau of Prisons' *a priori* declaration that a six-month placement is appropriate for reentry ignores two of the five factors in § 3621(b), "the nature and circumstances of the offense"<sup>454</sup> and "the history and characteristics of the prisoner,"<sup>455</sup> thus denying the statutorily mandated individualized assessment to each inmate.

The rule presumes that all federal inmates are similarly situated before the evaluation takes place. The pre-determined length of placement is a presumption that guides the evaluation of each counselor at each institution; thus, it is unlikely that an objective evaluation occurs. Moreover, there are potential costs to the inmate for challenging a placement of six months or less. In at least one instance, an inmate claimed that merely asking the question about receiving a placement in excess of six months resulted in retaliation.<sup>456</sup> Similar arguments can be made with regard to the application of the bias or predetermination exception.

#### 4. Bias or Predetermination Issue

The Supreme Court has stated that exhaustion is not necessary where the agency is biased or has predetermined the issue.<sup>457</sup> In deciding that an agency is biased, prejudgment may be based on the fact that the agency has ruled on the issue in another circumstance involving another party. If so, then the exhaustion requirement may be satisfied.

The extraordinary justification exception rule has been repeatedly challenged and repeatedly upheld. The fact that federal inmates have continuously challenged the policy and the agency has not changed suggests that the Bureau of Prisons will retain the new rule unless it is required to change it by the courts, as it was with the 2002 and 2005 Rules.<sup>458</sup> Furthermore, the Bureau of Prisons' failure to respond to comments when it proposed the rule indicates that the agency is not willing to reconsider its assessment that six months is necessary even though organizations and individuals stated that the cap on halfway house placement would be detrimental to an inmate's prospects for successful reentry.

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454. 18 U.S.C. § 3621(b)(2) (2010).

455. *Id.*

456. *Bruce v. Apker*, No. CV 08-619-TUC-FRZ (JCG), 2009 WL 2509170, at \*3 (D. Ariz. Aug. 17, 2009); *Morrow v. Rios*, No. 08-320 (JRT/RLE), 2009 WL 924525, at \*7 (D. Minn. Mar. 31, 2009); *Wales v. Trung*, No. 08-39 (JNE/JJK), 2009 WL 4906502, at \*12 (D. Minn. Dec. 16, 2009).

457. *McCarthy v. Madigan*, 503 U.S. 140, 148 (1992).

458. The Interim Rule that the Bureau of Prisons proposed, 73 C.F.R. § 62440-01 (2008), with a request for comments, has neither become final nor has the Bureau of Prisons responded to the comments.

The requirement that an inmate must exhaust the administrative remedy process serves no legitimate purpose when the agency has decided that six months is sufficient. Inmates who are forced to exhaust the administrative remedy process are denied judicial access, as well as longer time in halfway houses. Under such circumstances, inmates face an unreasonable delay, another recognized exception to the exhaustion doctrine.

### 5. Unreasonable Delay

Under the unreasonable delay exception, a delay that ultimately renders the administrative remedy inadequate will suffice for the court to allow a petitioner judicial access in the absence of exhaustion. According to the Supreme Court, exhaustion is not required when an unreasonable administrative delay has rendered the administrative remedy inadequate.<sup>459</sup> That is precisely the case when an inmate challenges the Bureau of Prisons' extraordinary justification exception rule.

When the Bureau of Prisons determines that an inmate shall be placed in a halfway house for a specified period of time that is less than the maximum allowed under § 3624(c), it is inevitably going to be challenged on the grounds that the length of stay is insufficient and the process used to determine the placement is contrary to § 3621(b). The remedy being sought by an inmate is placement in a halfway house for the maximum length of time. The administrative remedy process cuts into the twelve-month time period. Therefore, the delay will render the remedy inadequate.

Reliance on the exhaustion doctrine to deny judicial access contributes to the continued application of a misguided rule. Furthermore, it undermines the legislative intent of §§ 3621(b) and 3624(c) to increase the reentry prospects of inmates. Not only do the courts invoke this doctrine to deny access, but they also apply the mootness doctrine, which has the same ultimate result of denying judicial review.

#### *B. Mootness Doctrine Prevents Challenges*

Following the changes to the Bureau of Prisons' halfway house placement policy, numerous federal inmates filed habeas petitions but were never heard because the inmates had been transferred to halfway houses and thus the petitions had become moot. The application of the mootness doctrine, which denies inmates the opportunity to obtain judicial review of the Bureau of Prisons' halfway house placement policy, implicitly reaffirms a misguided statutory interpretation. Without the

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459. See *Gibson v. Berryhill*, 411 U.S. 564, 575 (1973) (noting that delay often renders the administrative remedy inadequate); *Smith v. Ill. Bell Tel. Co.*, 270 U.S. 587, 591-92 (1926) (noting that an applicant need not wait "indefinitely" before seeking relief).

mootness doctrine preventing access, courts would make the determination under *Chevron* that the Bureau of Prisons' policy contravenes congressional intent to utilize the five factors in § 3621(b). Moreover, courts would also determine that the Bureau of Prisons has exceeded the discretion granted to the agency by Congress.

Federal courts will typically dismiss an action when there is no longer a case or controversy for the court to decide, thus mootness prevents a court from hearing a case when it is unable to provide the remedy being sought.<sup>460</sup> In the case of a federal inmate seeking a transfer to a halfway house, if the inmate has been transferred and thus obtained the remedy that the court would provide, there is no longer a case or controversy. Although the inmate has been placed in a halfway house, this remedy is unacceptable. It is not the placement that is important, but the process for being considered for placement and the length of time that an inmate is placed.

The statutory requirement of § 3621(b) requires the Bureau of Prisons to consider five factors on an individual basis, which the extraordinary justification exception rule does not. The statutory intent of § 3624(c) contemplates placements for up to twelve months, which the extraordinary justification exception rule does not accomplish because of the six-month cap. The mootness doctrine shields the Bureau of Prisons from a substantive review of its actions, thereby allowing the Bureau of Prisons to continue to improperly interpret §§ 3621(b) and 3624(c) and deny inmates an opportunity for a longer halfway house placement. This denial of a longer placement has real life implications on an inmate's prospect of successfully reentering society and not recidivating, thus jeopardizing the safety of others. Although the transfer to a halfway house technically moots the petition, federal courts have recognized exceptions to the doctrine, including the capable of repetition yet evades review exception. State courts have gone further and also adopted a public importance exception to the mootness doctrine which the federal courts should consider adopting as well.

### 1. Capable of Repetition Yet Evades Review

The capable of repetition yet evades review exception is an exception to the mootness doctrine that recognizes that the operation of a challenged policy may be too short in duration for a proper review to occur, but the party affected by the policy will likely be faced with the

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460. Lea Brilmayer, *The Jurisprudence of Article III: Perspectives on the "Case or Controversy" Requirement*, 93 HARV. L. REV. 297, n.10 (1979) (citing C. WRIGHT, HANDBOOK OF THE LAW OF FEDERAL COURTS § 12, at 39 (3d ed. 1976) (stating there is no case or controversy remaining once issue is moot)).



same situation at a later date.<sup>461</sup> The most celebrated example of this exception is when the Court ruled on the legality of abortion.<sup>462</sup> In that instance, a woman is likely to become pregnant again in the future and will be faced with having to decide whether to terminate her pregnancy.<sup>463</sup> Because the resolution of the challenged action would last longer than the nine-month gestation period, the legality of abortion would never be able to be reviewed.

Under this exception, mootness will not preclude review when the following two elements exist: “(1) the challenged action [is] in its duration too short to be fully litigated prior to its cessation or expiration, and (2) there [is] a reasonable expectation that the same complaining party [will] be subjected to the same action again.”<sup>464</sup> For inmates seeking to challenge the extraordinary justification exception rule, the length of time between when the inmate is evaluated and receives placement is too short in its duration, particularly if the inmate is forced to submit to the administrative remedy process.

Courts have been reluctant to apply this exception to the criminal justice context, such as when an individual is rearrested and subjected to abuse by a law enforcement officer.<sup>465</sup> The exception requires that there be a “reasonable expectation” of facing the adverse agency action.<sup>466</sup> For inmates being released, there is a similar parallel. It is presumed that inmates are unlikely to face the adverse agency action again.<sup>467</sup> Courts may therefore want to reconsider this position in light of the evidence on recidivism.<sup>468</sup> The placement of an individual in a halfway house has a direct impact on the success or failure of that individual upon release.<sup>469</sup> As the recidivism data indicate, one-third of individuals are likely to recidivate within one year of release and approximately two-thirds will

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461. See *Trans Int'l Airlines, Inc. v. Int'l Bhd. of Teamsters*, 650 F.2d 949 (9th Cir. 1980); See also *S. Pac. Transp. Co. v. St. Charles Parish Police Jury*, 569 F. Supp. 1174 (E.D. La. 1983).

462. *Roe v. Wade*, 410 U.S. 113 (1973).

463. See *id.*

464. *Weinstein v. Bradford*, 423 U.S. 147 (1975) (citing *Sosna v. Iowa*, 419 U.S. 393 (1975)).

465. See *Los Angeles v. Lyons*, 461 U.S. 95, 105 (1983) (noting that harm is dependent on police's arresting plaintiff again and subjecting him to chokehold).

466. *Allred v. Webb*, 641 So. 2d 1218, 1220 (Miss. 1994).

467. *Pierce v. Thomas*, No. 09-35781, 2010 WL 4130911, at \*1 (9th Cir. Oct. 21, 2010) (“[W]e conclude that there is no reasonable expectation that Pierce will be subject to these RRC policies again, and that Pierce's claims are not ‘capable of repetition, yet evading review.’”). The presumption however ignores the recidivism data that almost two-thirds of inmates will recidivate within the first three years upon release. See *supra* note 7 and accompanying text.

468. See LANGAN & LEVIN, *supra* note 7.

469. See Memorandum in Support of Amended Petition, *supra* note 88, at 53–54.

recidivate within three years.<sup>470</sup> Inmates that are released without some form of pre-release custody are more likely to re-offend than those who have a less abrupt transition from incarceration to freedom.<sup>471</sup> With the increased attention devoted to reentry, courts should adopt the public importance exception to the mootness doctrine that is applied in some state courts.

## 2. Adopting a Public Importance Exception

The public importance exception permits a court to resolve an otherwise moot issue if that issue involves a substantial public interest. For the exception to apply, it is necessary to demonstrate a “clear showing” of each of the following: “(1) the question presented is of a public nature; (2) an authoritative resolution of the question is desirable to guide public officers; and (3) the question is likely to recur.”<sup>472</sup> The length of time that a federal inmate should be placed in a halfway house satisfies each of these elements and is discussed below.

### *a. Public Nature of the Question*

The Bureau of Prisons’ halfway house placement policy is of public nature because it is central to the successful reentry of federal inmates. Moreover, the initial change in its policy and the current extraordinary justification exception rule altered a longstanding practice that enabled an inmate to be transferred or to be placed directly into a halfway house at any point in the sentence and for any length of time.

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470. LANGAN & LEVIN, *supra* note 7, at 1, 3.

471. See *Ferguson v. Ashcroft*, 248 F. Supp. 2d 547, 572 (M.D. La. 2003).

472. *Cinkus v. Stickney Mun. Officers Electoral Bd.*, 886 N.E.2d 1011, 1017 (Ill. 2008) (presenting the elements necessary to establish the public importance exception to the mootness doctrine); see also *In re Shawn P.*, 916 A.2d 399, 406 (Md. Ct. Spec. App. 2007) (“A court may decide a moot question where is an imperative and manifest urgency to establish a rule of future conduct in matters of important public concern, which may frequently recur, and which, because of inherent time constraints, may not be able to be afforded complete appellate review.”); *Dyer v. Securities and Exch. Comm’n*, 266 F.2d 33, 47 (8th Cir. 1959) (“In still wider horizon, there also is a recognized right of judicial discretion, in the public interest, to deal with the validity or propriety of administrative regulations and actions, where they have justiciably been brought into court, even though they may perhaps have ceased thereafter to have a direct significance in the particular situation. This does not mean that a court is required or has the right to engage in a decision of this character in every such situation; but it is judicially entitled to do so where it appears that some general benefit may public-wise, or in relation to the possibility of further similar litigation, come from having it established whether the administrative agency has acted within or without its authority.”). In *Cinkus*, the case deals with an interpretation of a statute that impacts elections. In *In re Shawn P.*, the issue is about a juvenile defendant. See *supra* Part I.

Reentry is an issue of public concern that has regained the national spotlight. It has been highlighted in three successive presidential administrations.<sup>473</sup> It was the impetus for one of the most far-reaching bipartisan legislative efforts, the Second Chance Act,<sup>474</sup> which is dedicated to creating a holistic response to assisting ex-offenders as they transition from incarceration to freedom.<sup>475</sup> For federal inmates, a key component for successful reentry is the halfway house, on which various stakeholders, including judges, attorneys, and inmates have come to rely.

With the increased focus on reentry and providing inmates with the best opportunity to be successful upon release and the numerous changes in policy, this issue has become one of public interest. Moreover, with the growth of prison populations, halfway houses will become an increasingly important tool for rehabilitation.<sup>476</sup>

The halfway house provides an opportunity to reduce criminal justice administration costs. The placement of inmates in halfway houses is less expensive than in traditional penal facilities. Further, if inmates reenter society successfully and become law-abiding, they are less likely to re-offend, thus reducing the costs of re-prosecution or re-incarceration. For the exception to apply, the issue must require an authoritative resolution to guide the many public officers that must implement the policy.

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473. See *supra* Part I; Herckis & Seeger, *supra* note 9, at 9; Thompson, *supra* note 10, at 260.

474. See *supra* Part II.A.

475. Second Chance Act of 2007, Pub. L. No. 110-199, 122 Stat. 657 (2008) (codified in scattered sections of 18 and 42 U.S.C.).

476. See Fehr, *supra* note 58, at 5 (“In contrast, in 1940, the federal prison population was 24,360. That number did not change significantly for 40 years, so that in 1980, the population was 24,640. From 1980 to 1989, the inmate population more than doubled to almost 58,000. During the 1990s, the population more than doubled again, reaching 134,000 at the end of 1999. The current population is expected to increase to over 215,000 by the end of 2011. Annually, the Bureau returns 45,000 federal inmates to our communities, a number that will continue to increase as the population grows.”); See also U.S. DEPT. OF JUSTICE, ABOUT THE FEDERAL BUREAU OF PRISONS, *supra* note 352 at 3 (“Most of the challenges affecting the Bureau today relate to the agency’s growth. At the end of 1930 (the year the Bureau was created), the agency operated 14 institutions for just over 13,000 inmates. In 1940, the Bureau had grown to 24 institutions with 24,360 inmates. Except for a few fluctuations, the number of inmates did not change significantly between 1940 and 1980 (When the population was 24,252); however, the number of institutions almost doubled (from 24 to 44) as the Bureau gradually moved from operating large institutions confining inmates of many security levels to operating smaller, more cost effective facilities that each confined inmates with similar security needs.”).

*b. Authoritative Resolution is Desirable to Guide Public Officers*

The Bureau of Prisons' policy requires an authoritative resolution to guide its public officers.<sup>477</sup> Bureau of Prisons' staff are guided by a policy statement,<sup>478</sup> which identifies the significant changes to the policy following the passage of the Second Chance Act, such as an increase in the evaluation period and the capping of placement to six months absent an extraordinary exception and prior written approval.<sup>479</sup> The issue with the policy statement is not clarity, but whether the Bureau of Prisons' actions are in accord with its statutory mandate and whether the evaluators have a clear understanding of what constitutes an extended placement.

In a couple of cases, a Bureau of Prisons' staff member in the facility where the inmate is housed (i.e. the unit team member) evaluated and recommended placement in excess of six months, only to be overruled by another actor in the chain of command.<sup>480</sup> With either denials or reductions of recommended placement time, lower-level officers are unclear as to what constitutes an appropriate placement. On the one hand, the statute states that an inmate can receive as much as twelve months in a halfway house. On the other hand, the Bureau of Prisons' stated policy provides inmates with only six months. These institutional actors are therefore caught between the statutes, §§ 3621(b) and 3624(c), and the Bureau of Prisons' policy.<sup>481</sup> Hence, a resolution from the courts clarifying that the placement is statutorily mandated and permitted along with providing a non-exhaustive list of extraordinary justifications would serve as a better guide.

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477. Cinkus v. Stickney Mun. Officers Electoral Bd., 886 N.E.2d 1011, 1017 (Ill. 2008).

478. See FED. BUREAU OF PRISONS, PROGRAM STATEMENT 7310.04, *supra* note 15.

479. *Id.*

480. Garrison v. Stansberry, No. 2:08cv522, 2009 WL 1160115, at \*2 (E.D. Va., Apr. 29, 2009) ("On May 13, 2008, Garrison's Unit Team at FCI-Petersburg considered him for pre-release placement in an RRC. After review, the Unit Team recommended Garrison be placed in an RRC for more than six months. That recommendation was forwarded to the warden at FCI-Petersburg, who in turn wrote a memorandum, on June 12, 2008, to the BOP's Mid-Atlantic Regional Director. That memorandum requested approval for Garrison to be given more than six months in an RRC. On June 23, 2008, the Regional Director denied the warden's request."); Roman v. Berkebile, No. 3-08-CV-0002-N, 2008 WL 4559825, at \* 2 (N.D. Tex. Oct. 6, 2008).

481. See Strong v. Schultz, 599 F. Supp. 2d 556, 563 (D. N.J. 2009) ("This Court finds that, by instructing staff that pre-release placement needs can usually be accommodated by a placement of six months or less and by denying staff the discretion to recommend a placement longer than six months (Without advance written approval from the Regional Director), the April 14, 2008, Memorandum is inconsistent with the Second Chance Act's amendments to § 3624(c). The April 14, 2008, Memorandum impermissibly constrains staff's discretion to designate inmates to a CCC for a duration that will provide the greatest likelihood of successful reintegration into the community, contrary to § 3624(c)(6)(C).").

The Bureau of Prisons would likely argue that administrators who have oversight responsibility of the entire placement process provide greater consistency for applying the policy than the courts. This interpretation overlooks the inconsistency and changes in policy over the last ten years for both staff and inmates. A placement policy that has been judicially reviewed to determine whether it adheres to Congress' mandate or contravenes it would guide the Bureau of Prisons' staff to craft a placement plan that adequately reflects the dual goals of the Second Chance—reducing recidivism and increasing public safety. The last requirement for the public importance exception is whether the question is likely to recur.

*c. Question is Likely to Recur*

The Bureau of Prisons' halfway house placement policy has been an unresolved question following the 2002 change in policy, which has remained unresolved through subsequent legislation. Moreover, the policy lacks support from criminal justice agencies and entities invested in the issue, and will continue to be subject to inmate challenges. Instead of postponing judicial review of whether the agency is properly engaging in the placement of federal inmates in halfway houses, it would behoove the court to entertain the issue and resolve it once and for all.

Halfway house placement has long been deemed important for inmates for many reasons. It provides an inmate with an opportunity to establish an employment record for future employers to consider. This is especially valuable given that a substantial percentage of inmates were unemployed prior to incarceration<sup>482</sup> and have been out of the "workforce" while incarcerated.<sup>483</sup> It also allows an inmate to reconnect with and to resurrect family relationships that may have suffered because of the inmate's absence.<sup>484</sup>

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482. Joan Petersilia, *From Cell to Society: Who Is Returning Home?*, in PRISONER REENTRY AND CRIME IN AMERICA 26–27 (Jeremy Travis & Christy Visser eds., 2005); TRAVIS, *supra* note 96, at 157–60.

483. Inmates are often required to work while incarcerated. See LEGAL RESOURCE GUIDE TO THE FEDERAL BUREAU OF PRISONS, 14–15 (2008). ("The BOP is authorized to require inmates transferred to RRCs to pay a portion or all of the costs of their confinement, and with few exceptions, all employed offenders confined in RRCs must make payments toward their housing costs.").

484. See *Iacoboni v. United States*, 251 F. Supp. 2d 1015, 1022–23 (D. Mass. 2003) ("[R]eliance on the availability of a community confinement designation derived not just from the statute . . . but also on the undisputable fact that . . . such a designation makes eminently good sense. When one remembers that persons placed in community corrections are generally minor offenders, with minimal or no criminal records, and no history of violence, the decision to entirely eliminate community corrections as an optional imprisonment designation becomes even more astonishing.").

[F]or the defendant . . . [i]mprisonment in a halfway house usually means the inmate will be residing closer to his or her home community, can continue employment outside the facility during the day, and can maintain ties with vulnerable family members, such as children or ailing parents . . . For innocent third parties, particularly children, the economic and emotional devastation caused by a parent's distant incarceration can be, to some extent, palliated. With the inmate employed, families can stay off welfare; with a parent available, children can avoid placement in foster homes. For the Government wishing to recognize substantial assistance provided by a cooperating defendant this option also holds out advantages during plea negotiations, and at sentencing. Finally . . . the Number One beneficiary of community corrections is the American Taxpayer, since the cost of community confinement, when it serves the interests of justice, is far less than the price tag on more conventional forms of imprisonment.<sup>485</sup>

Halfway houses have long been recognized, even by the Bureau of Prisons, as a tool for reentry.<sup>486</sup> Inmates that are not transitioned back to society via a halfway house are more likely than their halfway house counterparts to re-offend. Every inmate that is sentenced to a federal prison, a first timer or recidivist, will be considered for halfway house placement, unless the inmate has committed a more violent crime, thus making him fully ineligible. Hence, it is imperative that the courts review the halfway house placement policy of the Bureau of Prisons.

Although this Article makes the argument that judicial review is needed to determine whether the Bureau of Prisons' policy has exceeded its discretion, the Bureau of Prisons should designate all eligible inmates to halfway houses for a full twelve months. After an inmate has served six months in a halfway house, the halfway house staff will conduct an evaluation of the inmate's progress in adapting to life as a law-abiding citizen. If at that time the inmate does not pose a threat to others, then the inmate can be transferred to home confinement as dictated by § 3624(c)(2). If the inmate is not ready for that responsibility, then the inmate can remain in the halfway house. Either way, the inmate receives the necessary amount of time in a halfway house to gain the skills needed to reenter society successfully, as well as the structured support to readjust to life outside of a penal facility.

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485. *Id.*

486. See TRAVIS, *supra* note 96, at 241 ("Corrections agencies sometimes provide housing as a buffer between prison life and life in the free world. Typically called 'halfway houses,' these facilities offer prisoners near the end of their sentences a structured and regulated environment as they adjust to life in the community.").

## CONCLUSION

Reducing recidivism and increasing public safety are twin goals of the Second Chance Act. The Second Chance Act resurrects the concept of rehabilitation by providing a holistic response to the needs of ex-offenders as they attempt to reenter society following incarceration. The Second Chance Act provides reforms across state, federal, and tribal jurisdictions. It targets juveniles, adults, and elderly offenders, and it provides alternatives for first-time offenders. Of the numerous changes made by the Second Chance Act, the provision devoted to reforming existing correctional policies at the federal level, particularly the length of time that federal inmates spend in halfway houses, is of paramount importance. The Second Chance Act increased the amount of time that an inmate may spend in such facilities to twelve months, but the Bureau of Prisons has resisted placements in excess of six months without an extraordinary justification and prior written approval of a Regional Director. This requirement, which is contrary to the statutes that guide the Bureau of Prisons' placement policy, is an impermissible exercise of discretion and an unreasonable interpretation of the statute. Inmates have been overwhelmingly precluded from changing the agency's actions because of the judicial doctrines of exhaustion and mootness. Given the importance of reentry for the individual and the community at large, courts should relax the standards of access by recognizing that the Bureau of Prisons has predetermined the placement decision. Moreover, reentry is of such importance that the courts should also adopt a public importance exception to overcome the mootness doctrine. Judicial review would reveal that the Bureau of Prisons is not entitled to deference, and that its policy is an impermissible exercise of discretion.